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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~182~~ 202

JOHN DOBSON AND JAMES DOBSON, APPELLANTS,

vs

JOHN DORNAN, FRANCIS MAYBIN, ROBERT DORNAN & JOHN PICKENS, TRADING AS DORNAN, MAYBIN & COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED MARCH 9, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 482.

JOHN DOBSON AND JAMES DOBSON, APPELLANTS,

vs

JOHN DORNAN, FRANCIS MAYBIN, ROBERT DORNAN & JOHN PICKENS, TRADING AS DORNAN, MAYBIN & COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

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1 UNITED STATES OF AMERICA, } *sct:*
Eastern District of Pennsylvania, }

In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit. No. 2. April Sess., 1875. In Equity.

JOHN DORNAN, FRANCIS MAYBIN, ROBERT DORNAN, and JOHN PICKENS, Trading as Dornan, Maybin and Company,

v.

JOHN DOBSON and JAMES DOBSON.

Pleas and proceedings before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, of April session, 1875. No. 2.

It is thus contained:

Be it remembered that on the 12th day of February, A. D. 1875, the complainants, by their solicitor, L. C. Cleemann, Esq., comes into our said court here and file of record their bill of complaint against John Dobson and James Dobson, which said bill, being read, is as follows, to wit:

2 In the Circuit Court of the United States for the Eastern District of Pennsylvania. In Equity.

To the honorable the judges of the circuit court of the United States, eastern district of Pennsylvania:

John Dornan, Francis Maybin, Robert Dornan, and John Pickens, trading as Dornan, Maybin & Co., bring this their bill of complaint against John Dobson and James Dobson.

And thereupon your orators complain and say:

That they are informed and believe that one Charles A. Righter was and is the original and first inventor of a certain new and useful design for a carpet pattern to be inwrought into two-ply ingrain and other carpeting, fully described in the letters patent hereinafter mentioned, and which had not been known or used before his said invention, and which was not, at the time of his application for a patent, as hereinafter mentioned, in public use, or on sale, with his consent or allowance.

And your orators, on information and belief, further show unto your honors that said Charles A. Righter, being so, as aforesaid, the first inventor and discoverer of said design for a carpet pat-
3 tern, as aforesaid, and being also a citizen of the United States, did, on the nineteenth day of August, one thousand eight hundred and seventy-three, upon due application therefor, obtain letters patent of the United States for said invention and design for a carpet pattern as aforesaid, which said letters patent were issued in accordance with the request of said Charles A. Righter to the said Dornan, Maybin & Co., as the assignee of his said inventor's whole right therein and thereto, before grant of letters patent as is by statute in such case made and provided, in due form of law, under the seal of the Patent Office of the United States, signed by B. R. Cohen, the

then acting Secretary of the Interior, and countersigned by M. D. Leggett, Commissioner of Patents of the United States, bearing date the day and year last aforesaid, and numbered 6822, whereby there was granted and secured to the said Dornan, Maybin & Co., and their assigns, or intended so to be, for the term of three and one half years, from and after the date of said letters patent, the full and exclusive right and liberty of making, weaving, using, and vending to others to be used, the said invention and design for a carpet pattern as aforesaid, as set forth in said letters patent here in court, ready to be produced as your honors may direct, will more fully and at large appear, and by virtue whereof said Dornan, Maybin & Co. became and are the sole owners of all the rights and privileges granted and secured, or intended so to be granted and secured, in and by said letters patent.

And your orators further show unto your honors that by virtue of the premises the said Dornan, Maybin & Co. became and now are the sole and exclusive owners of said letters patent and invention and design for said carpet pattern, and of all the rights and privileges granted and secured, or intended to be so granted and secured thereby; and that since said Dornan, Maybin & Co. became the owners thereof as aforesaid, the said Dornan, Maybin & Co. have invested and expended large sums of money, and have been to great trouble in and about said invention, and for the purpose of
4 carrying on the business and manufacturing and selling said design for a carpet pattern, and making the same profitable to said company and useful to the public; and that said invention and design has been and is of great benefit and advantage, and that two-ply ingrain and other carpetings have been and are still made by them according to said design for a carpet pattern in colors similar to those painted on the drawings accompanying the specification, and in other colors substituted in their place and sold by said Dornan, Maybin & Co. to great advantage to the public, and that the public have generally acknowledged and acquiesced in the aforesaid rights of your orators. And your orators believe that they will realize and receive large gains and profits therefrom if infringements by said defendant and their confederates shall be prevented.

Yet the said defendants, well knowing the premises and rights secured to your orators aforesaid, but contriving to injure your orators aforesaid, and to deprive them, your orators, of the benefits and advantages which might, and otherwise would, accrue unto your orators from said invention and design for a carpet pattern, and from the sole making and selling carpets made in accordance therewith, after the issuing of the letters patent as aforesaid, and before the commencement of this suit, did, as your orators are informed and believe, without the license or allowance, and against the will of your orators, and in violation of their rights, and in infringement of the aforesaid letters patent, and the rights secured thereby, unlawfully and wrongfully, and in defiance of the rights of your orators, make, construct, weave, use, and vend to others to be used, two-ply ingrain and other carpeting made according to, and employing and containing, said invention and design for a carpet pattern; and that

the said John Dobson and James Dobson, and each of them, still continue so to do, and that they threaten to make the aforesaid two-ply ingrain and other carpeting in large quantities, and to supply the market therewith, and to sell the same for the best prices that they can obtain, to the manifest injury of your orators, and all in defiance of the rights acquired by and secured to your orators as
5 aforesaid, and to their great and irreparable loss and injury, and by which they have been, and still your orators are being, deprived of great gains and profits, which your orators might and otherwise would have obtained, but which have been received and enjoyed, and are still being received and enjoyed, by the said defendants by and through their aforesaid unlawful acts and doings.

And your orators further show unto your honors, on information and belief, that said defendants have sold large quantities of said two-ply ingrain and other carpetings made in accordance with and in imitation of the said design for a carpet pattern of your orators, and have a large quantity on hand, which they are offering for sale, and have made and realized large profits and advantages therefrom, but to what extent and how much exactly your orators do not know, and pray a discovery thereof.

And your orators say that the use of said invention and design for a carpet pattern by said defendants and their preparation for and avowed determination to continue the same, and their other aforesaid unlawful acts in disregard and defiance of the rights of your orators have the effect to encourage and induce others to venture to infringe said patent in disregard of the rights of your orators.

And your orators further show unto your honors that your orators have always firmly affixed and now firmly affix to each roll of carpeting, bearing the design for a carpet pattern aforesaid, so made and sold by them as aforesaid, a certain label, containing, in words and figures, due notice that the same was and is patented, and of the date and number of the letters patent granted therefor.

And your orators further show unto your honors, on information and belief, that the defendants in this suit are engaged in the infringements and unlawful acts above complained of in the city of Philadelphia, in the State of Pennsylvania, but whether said defendants are so engaged in the manufacture, use, and sale of said design for a carpet pattern in two-ply ingrain and other carpeting,
6 as principals, or in what other way are concerned therein, your orators do not know and cannot state, and pray a discovery thereof by said defendants, and that said defendants may fully and particularly set forth how they are engaged as aforesaid in said manufacture, use, and sale, and how long they have been engaged or concerned therein, and in what way and to what extent; and forasmuch as your orators can have no adequate relief except in this court.

To the end therefore that the said defendants may, if they can, show why your orators should not have the relief hereby prayed, and may upon their best and utmost knowledge, remembrance, information, and belief, full, true, direct, and perfect answers make to the premises, and to all the several matters hereinbefore stated and

charged as fully and particularly as if separate and severally interrogated as to each and every of said matters, and may be compelled to account for and pay to your orators the profits by them acquired, and the damages suffered by your orators from the aforesaid unlawful acts.

And your orators pray that the said defendants, John Dobson and James Dobson, and each and every of them, their servants, agents, attorneys, and workmen, and each and every of them, may be restrained and enjoined by the order and injunction of this honorable court, from directly or indirectly making, constructing, weaving, using, vending, delivering, working, or putting into practice, operation, or use, or in anywise counterfeiting or imitating the said invention or design for a carpet pattern, to be inwrought in two-ply ingrain or other carpeting, or any part thereof, or any two-ply ingrain or other carpetings made in accordance therewith, in imitation thereof, or like or similar to those which your orators have heretofore made, and that the said defendant may be decreed to pay the costs of this suit, and that your orators may have such other and such further relief as to this honorable court shall seem meet, and as shall be agreeable to equity.

May it please your honors to grant unto your orators the writ of injunction, issuing out of and under the seal of this honorable
7 court, in due form of law, commanding, enjoining, and restraining the said defendants, and each of them, their servants, agents, attorneys, confederates, and workmen, and each and every of them, as is hereinbefore in that behalf prayed.

May it please your honors to grant unto your orators the writ of subpœna, issuing out of and under the seal of this honorable court, directed to the said defendants, commanding them by a certain day, and under a certain penalty, to be and appear in this honorable court, then and there to answer the premises, and to stand to, and abide such order and decree as may be made against them.

And your orators will ever pray, &c.

JOHN DORNAN.
FRANCIS MAYBIN.
ROBERT DORNAN.
JOHN PICKENS.

L. C. CLEEMAN,
Solicitor and of Counsel for Complainants.

UNITED STATES OF AMERICA, }
Eastern District of Pennsylvania, } *ss:*

On this sixth day of February, 1875, before me personally appeared Robert Dornan, one of the within complainants, who being by me duly sworn, did depose and say:

He has read the foregoing bill of complaint subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

ROBERT DORNAN.

Affirmed to and subscribed before me, the day and year first above written.

SAMUEL BELL,
U. S. Commissioner.

8 (Endorsed:) No. 2. April sess., 1875. United States circuit court, eastern district of Pennsylvania. In equity. John Dornan *et al. vs.* John Dobson and James Dobson. Bill of complaint. Sir: Issue subpœna, returnable to the first Monday of April next. L. C. Cleemann, sol'r & of counsel for compl'ts. Filed February 12th, 1875.

9 And afterwards, to wit, on the 13th day of March, A.D. 1875, the defendants, by their solicitor, Richard P. White, Esq., came into our said court here and file- of record their answer to the complainants' bill of complaint, which, being read, is as follows, to wit:

Answer to Bill of Complaint.

In the Circuit Court of the U. S. for the Eastern District of Pennsylvania. April Sessions, 1875. No. 2.

JOHN DORNAN, FRANCIS MAYBIN, ROBERT DORNAN, and JOHN PICKENS, Trading as Dornan, Maybin & Co.,
vs.
JOHN DOBSON and JAMES DOBSON.

These defendants, now and at all times hereafter, saving and reserving to themselves, and each of them, all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainants' bill of complaint contained, for answer thereunto, or unto so much and such facts thereof as these defendants are advised is or are material or necessary for them, or any of them, to make answer unto, they, these defendants, severally answering, say:

That these defendants have been informed, and believe, that one Charles A. Righter was and is the original and first inventor of a certain design for a carpet pattern, as set forth in the bill of complaint; but these defendants do not know the same of their own knowledge.

And these defendants, further answering, say they have been informed, and believe it to be true, that the said Charles A. Righter did, on the 19th day of August, 1873, obtain letters patent of the United States for said invention and design for a carpet pattern as aforesaid, which letters patent were issued to the said Dornan, Maybin & Co., as the assignee of said inventor's whole right therein and thereto, bearing date, signed, countersigned, and numbered as set forth in the bill of complaint, whereby there was granted and secured to the said Dornan, Maybin & Co., and their assigns, for the term of three and one-half years, the full and exclusive right
10 of making, weaving, using, and vending to others to be used, the said invention and design for a carpet pattern as afore-

said, as set forth in the bill of complaint; but these defendants, for greater certainty therein, crave leave to refer to the said letters patent when the same shall be produced.

And these defendants, further answering, say that they have never heard or been informed, save by the bill of complaint, whether the said Dornan, Maybin & Co. became and now are the sole and exclusive owners of said letters patent and invention and design for said carpet pattern, or whether the said Dornan, Maybin & Co. have, since becoming the owners thereof as aforesaid, invested and expended large sums of money, and been to great trouble in and about said invention, or whether two-ply ingrain or other carpetings have been and are still made by them, according to said design for a carpet pattern in colors, and sold by said Dornan, Maybin & Co. to the public, or whether the public have generally acknowledged and acquiesced in the rights of the complainants, as alleged in the bill of complaint; and these defendants cannot set forth as to their belief or otherwise in the aforesaid allegations in the bill of complaint.

And these defendants further severally say that they did not, nor did either of them, to the knowledge or belief of the other of them, after the issuing of the letters patent as aforesaid, and before the commencement of this suit, without the license or allowance, and against the will of the complainants, and in violation of their rights, and in infringement of the aforesaid letters patent, and the rights secured thereby, make, construct, weave, use, or vend to others to be used, two-ply ingrain or other carpeting, made according to and employing and containing said invention and design for a carpet pattern; nor do the said defendants, or either of them, still continue so to do, or threaten to make the aforesaid two-ply ingrain or other carpeting in large quantities, as alleged in the bill of complaint.

And these defendants, further answering, say that it may be true, for anything these defendants know to the contrary, that
11 the complainants have always firmly affixed, and now firmly affix, to each roll of carpeting, bearing the design aforesaid, so made and sold by them as aforesaid, a certain label containing due notice that the same was and is patented, &c., as set forth in the bill of complaint, but these defendants are utter strangers to all and every such matters, and cannot form any belief concerning the same.

All which matters and things these defendants are ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf wrongfully sustained.

JOHN DOBSON.
JAMES DOBSON.

This twelfth day of March, A. D. 1875, personally appeared before me the above-named defendants, John Dobson and James Dobson, and, being duly sworn, did declare and say that the statements contained in the above answer were correct and true to the best of their knowledge, information, and belief.

[SEAL.] CHARLES H. WHITE,
Notary Public.

(Endorsed:) C. C. U. S. 2 April sess., 1875. Dornan *et al. vs.* Dobson *et al.* In equity. Answer to bill of complaint. Filed 13 March, 1875. R. P. White.

12 And afterwards, to wit, on the 19th day of April, A. D. 1875, the complainants, by their solicitor, L. C. Cleemann, Esq., come into our said court here and file of record their replication to the answer of the respondents, which, being read, is as follows, to wit:

U. S. C. C., E. D. of Penna. April Sess., 1875. No. 2. In Equity.

JOHN DORNAN, FRANCIS MAYBIN, ROBERT DORNAN, and JOHN PICKENS, Trading as Dornan, Maybin & Co.,

vs.

JOHN DOBSON and JAMES DOBSON.

The replication of John Dornan, Francis Maybin, Robert Dornan, and John Pickens, trading as Dornan, Maybin & Co., complainants, to the answer of John Dobson and James Dobson, defendants.

These repliants, saving and reserving unto themselves all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto say that they will aver and prove their said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by these repliants; without this, that any other matter or thing whatsoever in the said answer contained, material or ineffectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things these repliants are, and will be ready to aver and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed,

L. C. CLEEMANN,
Solicitor for Complainants.

13 (Endorsed:) 2 April sess., 1875. U. S. C. C., E. D. of Pa. Dornan *et al. vs.* Dobson *et al.* In equity. Replication. Cleemann. Filed April 19, 1875.

14 And afterwards, to wit, on the 25th day of June, A. D. 1875, the complainants, by their counsel, appear in open court and move the court for the appointment of an examiner, whereupon the court made the following order, to wit:

U. S. C. C. Oct. Sess., 1874. No. 2.

DORNAN *et al. vs.* DOBSON *et al.*

And now, to wit, June 25, 1875, on motion of Cleeman, solicitor for complainants, the court appoint Sussex D. Davis, Esq., examiner, to take the proofs in the above case, and report the same to the court.

U. S. C. C., E. D. of Penna. In Equity. April Sess., 1875. No. 2.

JOHN DORNAN, FRANCIS MAYBIN, ROBERT DORNAN, and JOHN PICKENS, Trading as Dornan, Maybin & Co.,

vs.

JOHN DOBSON and JAMES DOBSON.

It is hereby agreed that the testimony taken in the above
15 case before Thomas E. Merchant, Esq., have the same force and effect as though Mr. Merchant had been appointed by the court examiner in the said case to take the proofs and report the same to the court.

RICHARD P. WHITE,
For Defendants.
L. C. CLEEMANN,
For Complainants.

JULY 6, 1875.

Present: L. C. Cleeman, solicitor for plaintiffs; R. P. White, solicitor for defendants.

DIXON BEAN, sworn:

I am thirty-nine years of age, and reside in Chicago, Illinois; I am in carpet business, in firm of Field, Righter & Co.; I have been in this business eighteen years.

Exhibit marked "T. E. M., No. 1, July 6, 1875," offered in evidence. (Patent.)

Exhibit marked "Exhibit No. 2, T. E. M., July 6, 1875," offered in evidence.

I am familiar with Exhibit No. 2; I first saw it two or three years ago; I think I first saw it at Dornan & Maybin's; I know the defendants in this suit; usually when I came to the market I cut off some clippings or cuttings, more particularly to get colorings for different patterns; I had selected a quantity of them at home, and directed my porters to put them up, and among them was Exhibit No. 2, in the second quality, and I had these samples directed to the care of Mr. Dobson, or to the hotel; they reached the mill—a portion of them—this piece amongst the number; after I had given out orders for what carpets I wished made, this piece was thrown out one side, and I spoke to some one there, I cannot say who it was, and asked whether they could not get one up something similar in color that complexion of carpet; there was no mention of
16 copying the patent; afterwards I received a carpet from the defendants, which was similar to Exhibit No. 3, T. E. M., July 6, 1875; I think I could distinguish the different manufactures; I should think that Exhibit No. 3 was made by Dobson, the defendants; Exhibit No. 2 is, I think, the most artistic pattern; I see a great number of different patterns in the carpet line in the course of my business.

Q. From your knowledge of designs of carpet patterns, do you think a designer could have produced Exhibit No. 3 without having first seen Exhibit No. 2?

(Objected to by Mr. White.)

A. I could not say; I am not well enough posted in the art of designing to give an opinion. I do not know what access they have to objects such as are produced in the design. These objects may be very common, for ought I know; they may have design works containing these different designs or objects.

Q. Do you remember ever having seen a carpet bearing the design of Exhibit No. 2 before you saw Exhibit No. 2?

A. I do not remember that I ever did; I have seen the Brussels with a medallion figure in it about the size of the largest medallion, but nothing in wool like it.

Cross-examined by Mr. WHITE:

My business in visiting the defendants was to order carpets made. My purpose in producing samples to the defendants was to give them an idea of the coloring that I wanted in the carpets. My idea was in bringing on the pieces of carpet to give the manufacturer an idea of the colorings I wanted in the carpets I might select; that is, in ordering from their patterns I could order them to make the carpets with such colorings as I gave them. When I showed them Exhibit No. 2, I asked them if they could produce me something of that style of color, and subsequently carpet (Exhibit No. 3) came from the defendants. I should say the design of No. 3 is not the same as that of No. 2. I have looked them over very carefully, and cannot find one object in one which is like any object in the other; every part of the pattern of No. 3 is different, I think, from No. 2.

17 Q. Leaving out similarity of color and similarity of position of the medallions, is there any resemblance which you can point out between the two patterns?

A. Taking a glance or look at them, they have something of a similar appearance; they wouldn't bear to be criticized though.

Q. Be good enough to point out wherein they resemble each other, except in the general coloring and the size and position of the medallions.

A. I don't know as I could.

Q. Can you say that the two designs are substantially the same, taken as a whole or taken in detail?

A. I think I answered that by saying that they are not alike in design; but taking a glancing look at them they have a similar appearance.

Q. It is no uncommon thing, is it, for carpets made by different makers, and of clearly different designs, where the objects are nearly the same size, and belonging to the same general class, and the colorings being the same, to have the same kind of similarity that you observe in these?

A. I have seen cases of that kind.

Q. Is there any difficulty in perceiving that these two exhibits are of different designs, whatever general similarity such as you have alluded to there may be between them.

A. No, sir.

Q. The similarity of which you speak, then, is not such a similarity as would lead you to mistake one pattern for the other?

A. No, sir.

DIXON BEAN.

Sworn and subscribed before me, this July 6, 1875.

SUSSEX D. DAVIS, *Examiner.*

18 CHARLES A. RIGHTER being duly sworn:

I am twenty-two years old; my name is Charles A. Wrighter; I reside at No. 321 Richmond street, Philadelphia.

Exhibit No. 1 shown witness.

I am familiar with that design; I am the original inventor of this design; I invented it about 28th of July, 1873; I assigned it to the plaintiffs.

Cross-examined by Mr. WHITE:

Every part of this design is original with me; I mean that every sprig and leaf is my own composition.

Q. And no part of the design suggested by any other design or pattern seen by you?

A. No, sir.

CHARLES A. RIGHTER.

Sworn and subscribed, this 6th day of July, A. D, 1875.

SUSSEX D. DAVIS, *Examiner.*

ARTHUR MCMASTER, being duly sworn, says:

My name is Arthur McMaster; I am thirty years of age; I reside at No. 24 Columbia avenue; I am foreman of the plaintiffs; I am familiar with Exhibit No. 2; it is made after the design contained in Exhibit 1; it is correct; there is no difference at all; I can't tell exactly when it was invented; I saw it when it was making, but I cannot give the exact time; Charles A. Righter invented it, the last witness; I have been foreman of the defendants ever since that was invented, and a good while before; we have turned out at one time on this pattern fourteen pieces per week; this pattern has been very successful; we have patterns that we only turned out one piece per week; with carpets of equal quality everything is
19 in the design; the plaintiffs have made large quantities of carpets bearing this design.

Cross-examined by Mr. WHITE:

No questions.

ARTHUR McMASTER.

Sworn and subscribed before me, this 6th day of July, A. D. 1875.

SUSSEX D. DAVIS, *Examiner.*

JOHN DORNAN, being duly sworn, says:

My name is John Dórnan; I am one of the plaintiffs; I am thirty-eight years of age; I reside at No. 1424 Franklin street, in the city of Philadelphia; I attend to the manufacturing, designing, and machinery part of our business; I have been connected with the carpet trade for twenty-eight years as carpet stamper, designer, manufacturer, and weaver; I have got up great numbers of designs, hundreds, perhaps thousands; No. 2 is more artistic than No. 3; it is more artistic and more graceful.

Q. Do you think, from your knowledge as designer, that any one could have produced No. 3 without having first seen No. 2?

A. In my estimation it would have been an utter impossibility; I can see that they have attempted and have transposed the figures of the one in the other, but left the configuration the same; I never saw No. 3 before I saw No. 2; I never saw anything like No. 2 until Mr. Righter invented and produced it in our place; I think I saw No. 3 first last summer; a party came into our place on Chestnut street and wanted a piece of our No. 408; this is Exhibit No. 2; we were ordered ahead upon it and could not let him have it.

(Objected to by Mr. White, to all conversation not in the presence of the defendant.)

He said he could get it at Riegel's, on Market street: I told him I did not think so, as it was a patented carpet of ours; he said he could, and would bet his money on it; immediately after he left, I went around to Mr. Riegel's store, and knowing the manager of the department, had a conversation with him, and saw Exhibit No. 3 in Mr. Riegel's place; that was the first time I saw it.

No cross-examination.

JOHN DORNAN.

Subscribed and sworn to before me, this 8th day of July, A. D. 1875.

SUSSEX D. DAVIS, *Examiner.*

JULY 9TH, 1875.

Present: Mr. Cleemann for complainants; Mr. White for defendants.

JOHN WILMER MARTIN, a witness called by complainants, being duly sworn, says:

Examined by Mr. CLEEMANN:

I am twenty-eight years old; my name is John Wilmer Martin; I am a salesman of carpeting; I reside at No. 1609 Franklin street, Philadelphia; I have been in carpets exclusively for four years and a half; I have sold them for nine years; I am familiar, very familiar, with pattern on Exhibit No. 2; I have sold a great deal of it, as

much so as any pattern we have got, I guess; it has been a very successful pattern, indeed; I am familiar with the pattern of Exhibit No. 3.

Q. From your experience as a seller of carpets, do you think an ordinary purchaser would be apt to mistake Exhibit No. 3 for Exhibit No. 2?

A. I think it would be almost impossible for any one to tell them apart that had not them together.

21 Q. Do you know of any instances where Exhibit No. 3 has been purchased, instead of Exhibit No. 2, by mistake?

A. Yes; I know of quite a number, where they bought No. 3 to take the place of No. 2.

Q. Can you state, from your experience in selling Exhibit No. 2, whether the sale of Exhibit No. 2 has been injured by the competition of Exhibit No. 3?

(Objected to by Mr. White.)

A. Yes; the sale has been injured in a number of instances.

Cross-examined by Mr. WHITE:

I am not engaged positively in any house now; I sell goods for Dornan, Maybin & Co. and other parties on commission; I have no store or place of business; I do not sell that grade of goods for any one except Dornan, Maybin & Co.

Q. Will you state your means of knowledge that any one bought No. 3 in place of No. 2?

A. I can tell you of one instance; the party told me himself that he bought it.

Q. Did that person tell you he bought No. 3 to take the place of No. 2?

A. Yes, sir.

Q. Was that the expression he used? If not, state what he said.

A. Just as near as I can recollect it, he had bought No. 2 of Dornan, Maybin & Co., but could not get it as fast as he wanted it, and ordered No. 3 to take its place.

Q. Then he was not deceived by the pattern, and did not mistake the one for the other?

A. My recollection is he did not know the difference until he got them together.

Q. Do you mean your recollection is he told you that?

A. Yes, sir.

(Objected to by Mr. White, to so much as is hearsay.)

Q. Be good enough to give me the name and address of that person.

22 A. J. H. Wyman, Burlington, Iowa.

Q. When did this take place, sir?

A. I think it was in seventy-four; I couldn't say positively; that is as near as I can fix the date, as I have been there frequently, and couldn't say on which occasion it was.

Q. Is it unusual in your business, when a man cannot get a particular pattern which he wishes, to order a different pattern as near the same general style as he can get it?

A. No, sir.

Q. It is not unusual, is it, for merchants to send orders for carpets, giving a general description of the sort of patterns they would like to have, such as with medallions of a certain size, and with flowers wreathed, set, or running designs?

A. It is the exception more than the rule.

Q. The rule, I suppose, is, that a man comes and selects the pattern himself, or orders from a sample; but where he cannot do this, is the other course not frequently taken?

A. Where parties have bought from seeing the sample, and want more goods, they are apt to duplicate the patterns they have by number.

Q. That is not the question which I asked you, and I now repeat it.

A. Yes.

Q. A large carpet house will generally have a large number of patterns which will answer a general description, such as I have indicated above, will they not?

A. Some houses run all their patterns of the same general design; some have a greater variety, more or less.

Q. Some make wreaths, some flowers, and so on; is that what you mean?

A. Some houses may have a trade for scroll patterns and small figures, and some for other designs.

Q. The most striking feature to an ordinary purchaser of those cheap carpets as that part of them which is in the solid color, is it not? I mean the centre pieces of the medallions.

A. I don't understand your question.

23 Q. What I mean to ask you is, whether an ordinary purchaser, in looking at either of those carpets, would not observe most prominently, at the first glance, the solid scarlet centre pieces of the medallions?

A. The scarlet, being bright, would naturally attract his eye first; a man buying goods would naturally look at the whole figure; no particular color would attract him.

(Objection made to the latter part of the answer by Mr. White, as not responsive.)

Q. The next thing that would be likely to strike an ordinary purchaser would be the general coloring, would it not?

A. That [and] the figure together.

Q. The design of the solid scarlet centres of these carpets is not peculiar to this design, is it?

A. No; the shape of No. 3 is like that of No. 2; the solid scarlet centre is made in other figures.

Q. That is common to a large class of designs, is it not?

A. Yes, sir.

Q. The peculiarity of the design of No. 2 is in the flower, sprig, and leaf part of the pattern, is it not?

A. I think the peculiarity of the pattern is the pattern itself—the work of it.

Q. Leaving out the solid part of which you have spoken, what else is there in the pattern, except the flower, sprig, and leaf, of which I have spoken?

A. The cornucopia holding the flowers in the jewel part of the pattern.

Q. Anything else, except the cornucopia and the flower, leaf, and sprig part?

A. I don't know as there is.

Q. Now, is there any cornucopia, or anything resembling the cornucopia, in anything but color, in pattern No. 3?

A. I think those roses are like the lower part of the cornucopia, or rather the cornucopia itself is.

24 Q. Do I understand you to say that the cornucopia in No. 2 appears anywhere in the pattern No. 3?

A. I think it does.

Q. Where?

A. I think it is in the jewel of No. 3.

Q. Then you consider those two figures the same, in pattern or design, so far as the cornucopia is concerned?

A. I do not say they are exactly the same, but the cornucopia in No. 2 is reproduced in No. 3.

Q. Will you look at the figure in No. 3, and say whether it is not a scroll pattern known to the trade as the letter "S" pattern, and used in many of Dobson's best known carpet patterns?

A. I never heard it spoken of as the "S" pattern in my life before.

Q. Have you seen it before in other patterns?

A. I don't think I recollect of ever seeing the same thing, until I saw it in that.

Q. Medallion patterns, with wreaths of flowers, leaves, and vines, are very common, are they not?

A. They have got to be since this has come out.

Q. Do you mean to be understood, that such patterns were not in use until No. 2 was put on the market?

A. There had been medallion patterns made before that, with leaves and flowers in them.

Q. Such patterns were made, both running and in wreaths in great variety, were they not, more especially in brussels carpets?

A. I don't think they were at the time this carpet was designed; since that they have been making more of that class of figures.

Q. Can you point out any similarity between those two patterns, independent of the coloring and the cornucopia, of which you have spoken, other than the general feature, that both have solid medallion centers, surrounded by flowers and leaves?

A. I think that the wreath of No. 3 produces the same effect as the wreath of No. 2.

25 Q. You are now speaking of the medallion with the sprig and leaf pattern in the centre in No. 2, and the medallion with the star or eight-pointed figure in No. 3?

A. I refer to the wreaths surrounding the medallions.

Q. Now, will you be kind enough to confine your attention to those two patterns, and say whether you mean to be understood that the design surrounding the medallion of No. 3, above referred to, resembles the wreath you have indicated in No. 2 in any respect, except in similarity of coloring?

A. I think the general effect produced in that is the same as the general effect produced in this.

Q. Can you point out similarity in the two patterns in detail which would produce the similarity of effect of which you have spoken?

A. I don't understand the question altogether.

Q. I wish to know wherein you can detect any similarity in those two patterns; your words "general effect" are too indefinite to my mind.

A. I will show you. The sprigs around the outer edge of the medallion are the same; there are sixteen of them.

Q. Anything else?

(Objected to by Mr. Cleeman, as irrelevant.)

A. The inner wreath of leaves in No. 2 around the scarlet is brought out in effect in the same place in No. 3. I can specify nothing more than the general effect of the whole thing.

Redirect examination by Mr. CLEEMAN:

Q. Is it not the almost universal custom for carpet dealers to purchase by sample or inspection of the goods?

(Objected to by Mr. White, as irrelevant and not re-examination.)

A. Yes, sir.

J. W. MARTIN.

Subscribed and sworn to before me, this 9th day of July, A. D. 1875.

26 GEORGE W. GOLDEN, being duly sworn, says:

Examined by Mr. CLEEMANN:

My name is George W. Golden; I am twenty-four years of age; I reside at No. 1010 Randolph street, Philadelphia; I am book-keeper for the complainants.

Q. What is your duty in reference to ticketing the goods?

A. My duty is to see that every piece of goods is ticketed properly, and where a pattern is patented to place a ticket on bearing the date and number of the patent, with the word "patented." The ticket on No. 2 is such a ticket.

Q. Has every piece of goods bearing the pattern Exhibit No. 2 that has gone from the complainants' mills since you have been with them passed your inspection; have they all been ticketed with a ticket similar to that on Exhibit 2?

A. Yes, they have; I have been with complainants more than two years and a half.

GEORGE W. GOLDEN.

Sworn and subscribed before me, this 9th day of July, A. D. 1875.

SUSSEX D. DAVIS, *Examiner.*

JULY 14TH, 1875.

Present: L. C. Cleemann, Esq., for complainants; R. P. White, Esq., for defendants.

THOMAS DEPUY, being duly sworn, says:

My name is Thomas Depuy; I am forty years of age; I reside at No. 1814 Park avenue; my store is No. 37 South Second street; I am a wholesale and retail carpet dealer, principally retail; I went into that business in 1850, and was in it until 1857, and out of it until 1870, and been in it from that time until the present.

27 Exhibit No. 2 shown witness.

Q. Are you familiar with that pattern?

A. I am.

Exhibit No. 3 shown witness.

Q. From your experience as a dealer in carpets, state whether or not an ordinary purchaser in buying a carpet would be likely to mistake Exhibit No. 3 for Exhibit No. 2?

A. In my opinion it is safe to say that not one customer in twenty-five would know the difference.

Q. Do you know of any instances in which the mistake has been made?

A. Mr. Golden, the book-keeper for the house of Dornan, Maybin & Co., stopped in at my store to get a carpet for his own use; wishing one of the pattern of Exhibit No. 2, he walked up to the imitation or copy, and said he wanted one off of this.

(Objected to by Mr. White.)

Pointing to the one off of the copy, naming the 408, and I then said: "No, I guess that is not [what] you want; it (the copy) was an extra superfine copy of the same pattern as near as I can tell.

(Objected to by Mr. White, as conversation between third parties and irrelevant.)

THOMAS DEPUY.

Sworn and subscribed to before me, this 14th day of July, A. D. 1875.

SUSSEX D. DAVIS, *Examiner.*

ALEXANDER W. SKILTON, being duly sworn, says:

I reside at No. 604 North Thirty-ninth street; I am thirty-one years old; I am in the carpet business; I am a retail carpet seller; with a short interval, I have been in it all my life.

Exhibit No. 2 shown witness.

28 I am familiar with the pattern.

Exhibit No. 3 shown witness.

I am familiar with that also.

Q. From your experience as a seller of carpets, please state whether or not an ordinary purchaser, in selecting a carpet, would not be likely to mistake Exhibit No. 3 for Exhibit No. 2.

A. Certainly he would; I think I have mistaken it myself.

Q. State on what occasion?

A. When I first saw Exhibit No. 3 I took it to be the same pattern.

Q. Where did you see it?

A. At Jacob Riegel's, on Market street; I enquired at that time if it was not Dornan & Maybin's goods, and I was told it was Dobson's.

Cross-examined by Mr. WHITE:

Q. Will you look at the two patterns now, and point out anything in the design of one which you could mistake for the design of the other?

A. The general design of both of them is very near alike to me; the wreath of fine flowers in the centre of No. 3, and the same wreath in No. 2, is so very near alike that it would deceive better judges than I am; also, the wreath of heavier flowers in the centre of both of them is the same, in my view; the only difference I can see in them is the exchange of a leaf for a rose.

Q. Take the first two medallions that you have referred to; is not the pattern of No. 2 a wreath composed exclusively of leaves of peculiar shape, and is not the wreath you compare with it in No. 3 a wreath of flowers with leaves of an entirely different shape and pattern?

A. In the first place, I think that the wreath of No. 2 is not composed of twigs alone; it has a leaf and running vines; and No. 3 is composed of the same thing, similar twigs, a running vine, and some small flowers put in in place of twigs.

29 Q. There are no flowers, are there, in the wreath of No. 2?

A. No, sir; I don't think there are any distinctly formed flowers?

Q. Are there any indistinctive forms of flowers?

A. I call those twigs and leaves, formed as they are on the wreath of No. 2, flowers.

Q. Then you consider a leaf and a flower so nearly alike that you would not only mistake one for the other, but knowingly call them by the same name?

A. I don't consider anything of the kind, sir.

Q. Would you call the wreath of No. 2 a wreath of flowers or a wreath of leaves?

A. I told you before I called it a wreath of leaves, twigs, and running vines.

Q. Do you mean to say that that would be a correct discription of the wreath of No. 3?

A. It is, with the exception of a few flowers, a twig taken out, and a flower put in.

Q. Then with the exception that you have spoken of the patterns are alike, are they, in those two figures?

A. I say they are near enough alike to be mistaken by better judges then I am in the business.

Q. Will you be good enough to point out any object in the one pattern, which resembles the other in any one thing but color?

A. The size of the figure, formation of the medallion wreaths, same number of figures to a breadth.

(Mr. White calls the witness's attention to the fact that the question is directed to the resemblance of the two medallions of which we have been speaking.)

A. The general resemblance is so near alike that almost any one would mistake the one for the other.

Q. Then you cannot show any detail in which the one corresponds with the other?

A. The wreath and twig and running vine which runs around the medallion of both medallions is so near alike that no one can tell the difference.

Defendants' Exhibit A shown witness.

30 Q. Be good enough to compare the same wreath in this Exhibit A where the colors are different, and state whether you think any person who knows one pattern from another when he sees it, on being shown those two carpets, would be likely to suppose that the pattern was the same in both.

A. No one who is a judge of those things would when they are compared together as now.

Q. Look at the wreath in this pattern corresponding to the one in No. 3, of which we have been speaking, and say whether any one would be likely to mistake it for the same wreath in pattern No. 2, of which you have spoken.

(Objected to by Mr. Cleemann.)

A. If it was in the same colors I think they would be very likely to do so; most any one purchasing would do so.

Q. Be good enough to answer my question, whether any one looking at the two wreaths in the two patterns now shown you, which are in different colors, would be at all likely to suppose the pattern was the same?

A. Do you mean putting them side by side?

(Mr. White says you can answer the question in any way you choose and fully as you choose.)

A. If you put them together and compare them as closely as they are there, I should say not; but separate them, and I know a great many would buy one for the other, so far as the patterns are concerned.

Q. Then I understand it to be your opinion that persons seeing a

carpet of No. 2 and a carpet such as Exhibit B would be likely to suppose that the designs were the same and the difference was only in the color?

A. That is my opinion; the figures may be larger in Exhibit B than in Exhibit No. 3.

Q. Where is your place of business?

A. No. 1118 Market street.

Q. In business by yourself there?

A. Yes, sir.

31 Q Wholesale or retail?

A. Retail.

A. W. SKILTON.

Sworn to and subscribed before me, this 14th day of July, A. D. 1875.

SUSSEX D. DAVIS, *Examiner.*

GEORGE W. GOLDEN recalled:

In September, 1874, I went to Mr. Depuy's to get a carpet with a design like Exhibit No. 2, and walking back the store I laid my hand on a piece of Exhibit No. 3, and said that was what I was looking for; but was told it was not the exact thing I was looking for, but no doubt could be given to me without my knowing any better.

(Conversation objected to by Mr. WHITE.)

Cross-examined by Mr. White:

When I laid my hand on the piece, as I have described, it was on the shelf with other carpets, rolled up in the usual way; the wrong side was out. This was in Mr. Depuy's store. I knew I had sent to him patterns of the carpet I wanted. I went to Mr. Depuy's not for the purpose of selecting patterns, but to get what I had decided upon beforehand.

GEORGE W. GOLDEN.

Subscribed and sworn to before me, this 14th day of July, A. D. 1875.

SUSSEX D. DAVIS, *Examiner.*

JOHN ROTHERA sworn:

My age is twenty-six years; I reside in Marlborough street, near Belgrade street; I am a power-loom boss; I know the Messrs.
32 Dornan and the Messrs. Dobson; I worked for John and James Dobson, I think, about fifteen months; I don't know exactly; I left them last February or March.

Exhibit No. 3 shown witness.

I saw that carpet worked at the Dobson's last summer and last winter; they had a great many looms going at one time on it.

Cross-examined by Mr. WHITE:

I could not tell how many looms they had running on it; I never

counted them. I cannot say how long any one loom was at work on it; they change the patterns about on the looms; I did not weave it myself, but I fixed No. 69 loom to weave it.

JOHN ROTHERA.

Sworn and subscribed before me, this 16th day of July, A. D. 1875.

T. E. MERCHANT,
Notary Public.

EXHIBIT No. 4.

Offered in evidence, marked by examiner July 16, 1875, "Exhibit No. 4, T. E. M., July 16, 1875."

OFFICE OF THE FALLS OF SCHUYLKILL CARPET MILLS,
Corner of Ninth & Chestnut Streets.

JOHN & JAMES DOBSON,
Proprietors.

W. OLDING NEWMAN,
Manager.

PHILADELPHIA, *May* 20, 1874.

MESSRS. DORNAN, MAYBIN & CO.

GENTLEMEN: We have your favor of this date, and note contents. We are not aware of infringing on any of your patterns. We, upon the previous notification, investigated this case throughout, and found that we were not interfering with you or your pattern, and can only reiterate upon what was stated to you previously, that we are not making any carpet for which you hold letters patent, notwithstanding the proof you say you have at 615 Chestnut street.

Yours truly, JOHN & JAMES DOBSON.

33 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

Between JOHN DORNAN and FRANCIS MAYBIN, Trading as
Complainants,
and
JOHN DOBSON and JAMES DOBSON, Defendants.

Testimony taken at Philadelphia, before Sussex D. Davis, an examiner appointed by said court.

FEBRUARY 2, 1876.

Present: James Dobson, one of the defendants. Richard P. White, Esq., counsel for defendants. John Dornan, L. C. Cleemann, counsel for plaintiffs.

THOMAS FINLEY, a witness, called on the part of the defendants, being duly affirmed.

Mr. White offers in evidence a drawing of his pattern, marked now S. D. D., Exhibit A, a carpet pattern marked S. D. D., Exhibit B.

Witness says: I am in the manufacturing of jute rope and yarns at present; my place of business is at No. 23 North Front street. I

was in the carpet business for about thirty-seven years, manufacturing and weaving together, also buying and selling. I went out of it a few weeks ago.

34 Q. Please examine Exhibits Nos. 2 and 3, and state whether you find any, and, if so, what similarity of design between them?

A. Well, there is something of a resemblance in the coloring, because the coloring is very much alike. There is a great deal of difference in the design.

Q. My question is, whether you find any similarity in the two designs; and, if so, what?

A. The similarity of the designs, I see, is, they are pretty nearly the same size of a design, but this figure on pattern No. 2, the drop pattern, is different from figure No. 3; I prefer No. 2. The pattern on No. 2 is more the shape of a vase and bouquet than anything I can compare it to. I couldn't compare this figure on No. 3 to a bouquet. I take it to be an entirely different figure. This centre on No. 2 is a sort of star pattern in a solid centre, with a wreath of flowers around it. I don't see that I could compare the figure in No. 2 to that in No. 3; No. 2 is far superior. The design is different; the figure is entirely different; No. 3 is a mean kind of a scroll, and No. 2 is a beautiful flower. The figure on No. 2 is distinct, and shows up bold as compared to No. 3; in No. 3 the flower is small and appears like a scrawl.

Q. Independent of any effect as to distinctness or indistinctness, will you tell us whether the different parts of the design in the two figures you are now comparing have any substantial similarity one to the other.

A. They would not to me, I consider No. 2 far superior.

Q. Independent of the consideration of superiority, are the two patterns alike, or in any respect similar as to the figures you are considering?

35 A. There is a similarity in the size of the figures, and there is a similarity in the coloring, but the design of the whole of No. 2 is far superior to No. 3. No. 2 is not like No. 3 at all.

Q. Are there any of the figures in pattern No. 2 like those in No. 3?

A. I don't see one exactly like the other.

Q. Is the design of No. 2, or any portion of it, sufficiently like No. 2, or any portion of that, to enable the one to pass for the other on any ordinary purchaser?

A. It would not be for me. I shouldn't think they would. I don't think there is such a similarity as to make an individual who had chosen No. 2 first, turn around and take No. 3 by mistake. I consider No. 2 so superior to No. 3.

Q. The only similarity you have been able to point out is the size of the figures and the colors employed in them. Will you please state whether the size of the figures in these patterns, or the colors employed in them, are peculiar or uncommon in any respect?

A. No; I don't see anything uncommon about them. I have wrought and manufactured hundreds of patterns, that I can see there

was a similarity in these figures before me. I am speaking now of the pattern, not of the color. I mean as to formation, and something as to similarity of size, too.

Q. Is the size of the figures used on either of those patterns uncommon or unusual?

A. No, sir.

Q. Are the colors used in those patterns unusual?

A. Not at this present time; they are colors lately introduced, but are now common. The coloring is two or three years old.

Q. Is there anything in the arrangement of the different figures, I mean as to the placing of them in the design, which is unusual?

A. No, sir; not at all.

36 Q. Are patterns, with solid centres, surrounded by wreaths and sprigs, an unusual design?

A. Oh, no, quite common; the centres in No. 3 are larger than in No. 2, but not near so fine to my taste.

Q. Apart from the fact that these designs are both wreath patterns, with solid centres, the coloring alike, do you find any resemblance or similarity between the two?

A. Have you reference to the designs, or to the flowers?

Q. I refer to the whole design.

A. I do not see anything just alike in the whole pattern.

Q. Do you find anything sufficiently alike, to be calculated to deceive or mislead?

A. It would not me; I don't see anything which could deceive or mislead me; it would be very hard for me to say whether it would deceive or mislead an ordinary purchaser; there are some parties who would not be able to carry the figure in their eye or mind at all, from the one store to the other; they would not be able to carry the design of either figure, for the reason that I have had them come from other stores to mine, and to tell that they had seen the very same figure in the store they had previously left, when I have known the design and figure, which I showed them, was the only one of the kind in Philadelphia.

Q. My question was as to an ordinary purchaser.

A. I don't think there is such a similarity as would deceive an ordinary purchaser.

Cross-examined by Mr. CLEEMANN:

Q. Is not the arrangement of the dark and light colors the same in both patterns?

A. There is a great deal of similarity in the color and shading.

Q. Is not the relative position of the drops, and the larger figures, the same in both carpets?

A. No, sir, I don't consider they are.

37 Q. Show me where they are different.

A. The drop in No. 3 is not like the drop in No. 2 at all.

Q. But is not the position of the drop in No. 3 in relation to the larger figures the same as the position of the drop in No. 2 in relation to the larger figures in No. 3?

A. Certainly. The position of the figures is the same, but the figures themselves are entirely separate and distinct.

Q. Do you not think it likely that the design on No. 3 is an imitation of the design on No. 2?

A. I would not call it such. You will see that these figures on No. 3 are entirely different from those on No. 2, and the flowers are entirely different. The design of No. 2 is far superior.

THOMAS FINLEY.

Sworn and subscribed before me.

SUSSEX D. DAVIS, *Examiner.*

WILLIAM T. CERNEO, being duly affirmed, and examined by Mr. WHITE, on the part of the defendants, says:

I have charge of the retail carpet department of Gould & Co., at 9th and Market streets. I have been familiar with the carpet business ten years this spring. I have examined the designs of Exhibits Nos. 2 and 3.

Q. Do you find any substantial similarity between them?

A. Nothing more than in the coloring.

Q. Is there any such similarity between the two as would mislead an ordinary purchaser?

A. There is not in my judgment.

Q. Is the general arrangement of the figures or the general
38 character of the design an unusual one, the arrangement of the medallion figures with the wreath around them?

A. It is not at the present time.

Q. That is a class of patterns now in fashion?

A. There are quite a number of them.

Q. Are the colors in these exhibits unusual, or are they used in all kinds of carpets?

A. They are at this time; they are used in all grades of ingrain carpet at this time, and in all the different designs.

Q. Do you find any one in figure in No. 2 substantially like any one figure in No. 3?

A. I do not; nothing more than in general design.

Q. By general design you mean that whole class of set figures with wreaths, am I right in that?

(Objected to by Mr. Cleemann. Question withdrawn.)

Q. What do you mean by general design?

A. The class of patterns that I would call wreath designs.

Q. Is that class of designs extensively in use?

A. They are; there are large numbers of the patterns.

WM. T. CERNEO.

Sworn and subscribed before me.

SUSSEX D. DAVIS, *Examiner.*

Adjourned to March 23, 1876, at 3½ o'clock, p. m.

MARCH 23, 1876, at 3½ o'clock p. m.

Present: L. C. Cleemann, Esq., for complainants; Robert Dornan, one of the complainants; and R. P. White, Esq., for defendants.

JOHN T. WEBSTER, being duly affirmed and examined by Mr. WHITE, says:

39 I am a designer; I have followed that business over thirty years; I am now in the employment of John and James Dobson.

Exhibits A and No. 1 shown witness.

I am familiar with these designs. One is Dornan's patent and the other Dobson's pattern, which is complained of as an infringement in this case.

Q. Please state if you find any, and, if so, what, points of similarity between those two patterns.

A. The plan is the same.

Q. What do you call the plan?

A. The plan consists of four centres or wreaths and a drop figure; that plan is common to both patterns.

Q. Is it peculiar to those patterns, or is it a plan which was in use prior to either of them; and, if so, to what extent, and how long?

A. It is not peculiar to those patterns. The extent of its use I could not say, but it has been in use at least ten years, to my knowledge, and it may be much more.

Q. How and in what way has that been in use?

A. It has been used by carpet manufacturers, and, also, I believe, by drugget manufacturers and ingrain carpet manufacturers; it has also been used by several manufacturers in various patterns. That applies for the time I have specified, to my knowledge.

Q. Then, if I understand you, wreath patterns and drop centres have been used by the trade over ten years, to your knowledge?

A. Yes, sir.

Q. Have you ever prepared any design yourself of this character; and, if so, when and for whom?

A. I have; prepared one in 1871, for Alexander Smith & Sons. Here it is, (Mr. Cleemann objects to this pattern being offered
40 in evidence. Pattern marked S. D. D., Exhibit D), and I would call this the same plan as the other two.

Q. Irrespective of the plan as you define it, do you find any substantial similarity between the Dobson pattern and the one in the letters patent?

A. Irrespective of the plan I see no substantial similarity.

Q. Point out, if you please, the points of difference between them.

A. In the patented design there are four centres or wreaths, each different from the other; in the Dobson patent there are four centres also, those marked as Nos. 2 and 4 being alike, and Nos. 1 and 3 also being like each other, but neither of them like any of the plaintiffs' centres or wreaths; the drop figures are far from resembling each other in the two patterns. I should say in the plaintiffs'

pattern there is evidently a representation of a group of roses, with accompanying leaves, and in defendants' the floral part is more of the form of a wreath or spray. The other features of the drop on the defendants' I would describe as the letter "S;" the other features of the plaintiffs' I am at a loss to describe; it does not resemble the letter "S."

Q. It has been alleged, in the course of this examination, that the designer of the defendants' pattern seems to have reversed the patented design, and reproduced the substantial parts of it in different positions from what they occupy in the original. Do you see anything of that kind in the patterns?

A. I do not.

Q. After a careful examination, can you state whether any one part of the patented design, excepting the plan as you have described, is to be found reproduced in the Dobson pattern?

A. I do not find anything in the defendants' pattern reproduced, with the exception of the plan.

41 Q. Do you find the same flower in either pattern; if so, in what instance?

A. I find roses in both; two roses are in the defendants' pattern, excluding the drop patterns, and in the patent I see only one, which is to be found in the lower right corner; the roses in the defendants' pattern do not resemble at all closely the one which appears on the patented design.

Q. Excluding the roses, do you find any leaf, spray, or flower in the defendants' design which is a reproduction of anything in the complainants' pattern?

A. I find no reproduction of any of these features in the defendants' design.

Q. Are patterns, made up of wreaths and groups of flowers, common or uncommon among carpet and wall paper and other similar designs.

A. They are quite common.

Q. Have you ever seen carpet or wall paper designs, anything resembling the drop pattern in the plaintiffs' design?

A. I have one here which is of similar character, it is on a wall paper; I have been familiar with that for four years. I have had this particular piece for four years. I have also duplicates of it. Carpets were manufactured and put on the market by Alexander Smith & Sons from Exhibit D. S. D. D., the same years that I designed it. This is cut from a wall paper which is in use.

Q. Looking at the two designs in controversy, will you state whether in your judgment there is any such similarity between them as would deceive ordinary purchasers?

A. I should think not.

Cross-examined by Mr. CLEEMANN.

Q. Is the drop figure an important feature in the plaintiffs' design?

42 A. Not so important as the wreaths.

Q. What is its importance?

A. Its importance in both designs is an intermediate figure placed at an equal distance from the centres to break the line of plain surface that would otherwise appear without the intervention of a drop figure.

Q. If the drop figure were omitted it would cause such a change in the figure as to make the design a different one, would it not?

A. I can hardly suppose that a designer for carpets would leave the design in the unfinished condition in which it certainly would be without a drop figure.

Q. You have seen, however, designs having the same general plan of wreaths that you speak of, in which the drop figure is left out, have you not?

A. I do not recollect having seen a design in which the drop figure or its equivalent was left out.

[Q.] What would you call its equivalent?

A. I would call its equivalent where a frame-work was introduced in the plan of the carpet that might only enclose a portion of the carpet where the drop figure is presumed to be of advantage, or it might also be planned to enclose the wreaths and form connections of frame-work or strap-work.

Q. Taking this view of the subject, is the drop figure an important feature in the two designs?

A. I have already answered that question by implication.

Q. Please answer it now directly.

A. Yes; it is an important feature.

Q. Is it of any importance as to the coloring in preparing to weave the carpet from the design?

A. The coloring of a carpet is of very great import after it is designed.

Q. That is, is the drop figure of any importance as to the
43 coloring in preparing to weave the carpet from the design?

A. It is.

Q. What importance?

A. It is of importance that the coloring of the drop figure should harmonize with the coloring of the other figures and centres and the ground.

Q. Does not the introduction of a drop figure assist the production of a more varied effect on the coloring of a design?

A. That is the effect intended to be produced by the introduction of drop figures.

Q. Would you not then consider that there was a radical difference between a design containing a drop figure and one in which it was omitted?

A. I would.

Q. There is no drop figure on Exhibit D, is there?

A. There is, or its equivalent.

Q. Would the figure which you say is equivalent to a drop figure in Exhibit D have the same effect as to allowing a greater variety of coloring as a drop figure; such as that in the design of the letters patent would?

A. It would have the effect of allowing as great a variety of color.

Q. Is that all?

A. That is all I have to say.

Q. I mean as to the space between the centres?

A. It would allow such a variety, but not as great a quantity; I mean that the space occupied by the drop figure in the patent is larger than the space occupied by the drop or the equivalent on Exhibit D; I would qualify what I have said above that it would allow as great a variety of color as has been introduced into the jewel or drop figure of the letters patent.

44 Q. Have you seen the design, Exhibit D, in carpet?

A. I have.

Q. In that carpet, was there as great a variety in color between the large figures as there is in Exhibit No. 2?

A. Distinguishing yellow from orange, I should say no.

Q. Was there as great a contrast?

A. I don't thoroughly understand that question.

Q. In the carpet, which you saw made after Exhibit D, was there as great a contrast of color on the space between the corner figures as there is in Exhibit No. 2, in that space?

A. There was.

Q. You have said that the use of the drop in Exhibit No. 2 is to break the line of plain surface between the corner figures; does the figure, which you say is equivalent to a drop in Exhibit D, does it do the same as effectually?

A. It does.

Q. You then see no difference between the drop in No. 2 and the equivalent in Exhibit D; is this so?

A. I see no difference, so far as the intention to break the line is concerned.

Q. Do you see any difference, as far the intention of making a greater variety of color is concerned?

A. I do not.

Q. Would you be apt to mistake a carpet bearing a design with a drop in it, such as that in Exhibit No. 2, with a carpet bearing the design of Exhibit D?

A. I would not.

Q. You have said that you were familiar with the design shown on the letters patent; when did you first see that design?

A. Strictly speaking, I have not seen the design until I saw the letters patent.

Q. Well, not speaking so strictly, when did you see it?

45 A. I saw—I couldn't state the time, say two years ago—a part of the patent design.

Q. Where?

A. At the Falls of Schuylkill, on the premises of defendants.

Q. What part did you see?

A. That is almost more than I could particularize, but I know that we did not have the complete figure.

Q. How do you know that?

A. Well, I know that one-half of the drop was not in our possession.

Q. Did you then get another piece which showed the whole figure?

A. We did not.

Q. Did you get a piece showing what that lacks?

A. I did not.

Q. Did the defendants get such a piece?

A. I do not know.

Q. Didn't you see such a piece?

A. I am not aware of ever having seen any other piece of plaintiffs' carpet than the piece referred and Exhibit No. 2.

Q. How did you come to see the first piece?

A. It came to my knowledge through having been left as a sample of shading.

Q. Who by?

A. By Mr. Dean—Dickson Dean.

Q. What did he leave it for?

A. For a sample of shading solely.

Q. Did you use it for that purpose?

A. I did not.

Q. Who did?

A. I believe Mr. Kerr—David B. Kerr—has used it for that purpose.

46. Q. Has any person in defendants' employ used it for that purpose?

A. None that I am aware of, other than he.

Q. Is he in their employ as a designer?

A. No.

Q. Has he been?

A. No.

Q. Has he ever been in their employ?

A. I have said above he was, but not as a designer.

Q. How was he employed by them?

A. You ask me more than I can tell.

Q. Why then have you said that he was in their employ?

A. I conclude that being on the premises myself during what are regarded as working hours, and seeing Mr. Kerr there also on the premises, that he was in their employ.

Q. Did you ever see him do any work there?

A. Yes.

Q. What have you seen him do?

A. I have seen him do various work; writing in books, and I presume he has many things to attend to besides, and I believe attending to the shading of the carpets; I have seen him do many things required of a weaver, or a superintendent of weavers.

Q. You have said that you saw Kerr use plaintiffs' design for shading colors, have you not?

A. I have not said so.

Q. What did you say in reference to Kerr and this design?

A. Your question indicated I had seen him use it.

A. I do not recollect exactly; I do not think I said anything about his using the design for shading carpets.

Q. Repeated.

A. I have no recollection of having said anything about Kerr and this design; my recollection is that I said it had
47 been left for shading purposes by Mr. Dean, I mean the piece of carpet was left?

Q. Is this the piece you saw?

A. I am sure I can't tell.

(Piece marked S. D. D., Exhibit E.)

Q. Was it like that?

A. So much as I had was like it.

Q. Didn't you have as much as that?

A. I did not.

Q. Can you indicate how much you did have?

A. As near as I can indicate I did not have a piece larger than sixteen or eighteen inches.

Q. Can you show what portion of this you had by marking a line on it.

(Mr. Cleemann requests the witness to mark out on Exhibit E a line, showing how much he had on the occasion when Mr. Dean left it.)

(Mr. White objects; that there is no such exhibit in the case; that this is not cross-examination.)

Mr. Cleemann requests the witness to mark out on Exhibit No. 2, so much of the cloth as Mr. Dean left, and he saw.

A. I cannot be definite enough to make a mark stating the limits of the part of the pattern Mr. Dean left.

Q. Was any portion of the drop in it?

A. There was.

Q. Which portion?

A. I don't know which it is; it is the upper portion as it appears on the letters patent.

Q. As much as half of it?

A. About a half, or near half; rather under than over a half.

Q. How much of the centre figure was there?

48 A. There were only parts of two centres; rather more than one-half of the two upper centres, that is my impression.

Q. Why do you think Mr. Kerr used the piece you have described for shading carpets?

A. Because I have seen carpets shaded in that way in the defendants' place.

Q. Have you seen the defendants' carpets shaded that way?

A. I believe I have.

Q. Do you make the design for defendants' carpet?

A. I controlled the making of it.

Q. What part did you do?

A. I made the drop.

Q. Had you seen the piece of defendants' carpet you spoke of, before you made the drop?

A. I did.

Q. Did you have it before you when you made the drop?

A. I did not.

Q. Who made the center pieces?

A. They were made under my direction by one of my assistants, John A. Gray.

Q. Is he in the city now?

A. He is not.

Q. You had seen this piece of the plaintiffs' carpet you speak of before the centres were made, is it not so?

A. Yes.

Q. Was this piece that Mr. Dean brought in the same colors as No. 2?

A. Yes, the same color, I believe.

Q. Had you any other person who assisted you in getting this design up?

A. Nobody.

Q. Do you know where that piece is?

A. I do not.

49 Q. Where was it the last time you saw it?

A. I think it was in the weaving-room.

Q. Was it ever in the designing-room?

A. It was.

Q. The designing-room is your room?

A. It is the one I take charge of.

Q. Was it in there when you designed the defendants' patterns?

A. I wish to correct the word "room"; I had a number of rooms; it was in there.

Q. Where were these designing-rooms you speak of?

A. At that time they were in the fourth story of defendants' carpet mill.

Q. Do you think you could find that piece of carpet?

A. I do not think I could; I have inquired for it frequently. I have not seen it for two years.

Q. Do you know whether or not it has been destroyed?

A. I do not.

Q. In whose possession was it when you last saw it?

A. I think, but am not positive, it was in the weaving room of defendants, and under the control of Mr. Kerr.

Q. Do you know what it was used for then?

A. I know of no further use than for shading purposes.

(Mr. Cleemann calls upon the defendants to produce the piece of carpet alluded to by this witness as having been left by Mr. Dean.)

Re-examined by Mr. WHITE:

Q. Is it not the custom amongst manufacturers to keep a large collection of odds and ends of carpets to show coloring?

(Objected to by Mr. Cleemann.)

A. It is; that is the case

50 Q. When customers order quantities of particular patterns is it usual to let them indicate from these odds and ends what colors they desire to have them in?

(Objected to by Mr. Cleemann.)

A. It is.

Q. Is it uncommon for customers, when ordering carpet of a particular pattern, to send a scrap of other goods to show the colors they would prefer to have what they order woven in?

A. It is a common proceeding.

Q. Was that what you meant by shading?

(Objected to by Mr. Cleemann. Question withdrawn.)

Cross-examined by Mr. CLEEMANN:

Q. Is it usual to keep these pieces in the designing-room?

A. It is in some factories.

Q. How is it with the defendants?

A. It is not now the custom with the defendants to keep those in-grain samples in the designing-room.

Q. When was it their custom?

A. I don't think that these pieces of carpets have been any of them stored or kept in the designing-room for nearly three years.

Q. Why was the custom changed?

A. The distance between the designing-room and the shading-room, to whom they are more useful, makes it inconvenient to the shader.

Q. Previous to three years ago it was the custom of the defendants to keep these pieces in the designing-room, is that so?

A. It was.

Q. What change has been made in the situation of the designing-room in the last three years?

A. It is in a building independent of the main building.

51 Q. Before the change of the designing-room, was it the custom of the defendants to let their customers come in the designing-room to order carpets?

A. It was not the custom.

Q. Why, then, were these pieces kept in the designing-room?

A. Because the shader and the designer are so intimately related in their business that they are generally placed near each other.

Q. Were the shading-room and designing-room near each other when you got up the defendants' design?

A. They were in the same building, two floors apart.

Q. Which was up stairs.

A. The designing-room.

JOHN T. WEBSTER.

Sworn and subscribed before me.

SUSSEX T. DAVIS, *Examiner.*

Adjourned to March 27th, 1876, at 3½ o'clock p. m.

MARCH 27TH, 1876, at 3½ o'clock p. m.

Present: L. C. Cleemann, Esq., for complainants; Robert Dornan, one of the complainants. Mr. White, of counsel for defendants, not being present, adjourned.

SUSSEX D. DAVIS, *Examiner*.

52 And afterwards, to wit, on the 25th day of April, A. D. 1876, this cause came on for argument on pleadings and proofs, and having been argued by counsel for the respective parties, the court entered the following decree to wit:

April 25th, 1876. This case came on to be heard on the pleadings and proofs, and was *agreed* by counsel for the respective parties, and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed that letters patent for a design for a carpet pattern, No. 6822, dated August 19th 1873, granted to Messrs. Dornan, Maybin & Co., assignees of Charles A. Righter, is a good and valid patent, being the pattern referred to in complainants' bill, and that the said Charles A. Righter was the first and original inventor of the design described and claimed in the letters patent, and also that the said defendants, John Dobson and James Dobson, have infringed upon the said patent, and the exclusive rights of the complainants under the same; and it is further ordered, adjudged, and decreed that the complainants do recover of the defendants, John and James Dobson, the profits, gains, savings and advantages which the said defendants have received or made, or which have arisen or accrued to them, from the said infringement of the said patented design, and also such damages in addition to said profits as the complainants may have sustained by reason of the said infringement; and it is further ordered, adjudged, and decreed that the complainants do recover of the defendants their costs and charges and disbursements in this suit, to be taxed; and it is further ordered, adjudged, and decreed that it be referred to John Cadwallader, Jr., Esq., as master, to ascertain and take and state and report to the court an account of the gains, profits, and advantages which the said defendants have received, or which have arisen or accrued to them, from infringing upon the exclusive rights of the said complainants, by the manufacture, use, and sale of carpeting bearing said patented design, and also what damages in addition thereto have been suffered by the complainants, by reason of said infringements; and it is further ordered, adjudged, and decreed that the complainants, on such accounting, have the right to cause an examination of the said defendants, *ore tenus* or otherwise, and also the production of the books, vouchers, and documents of the defendants, and that the said defendants attend for such purposes before said master, from time to time, as said master shall direct; and it is ordered, adjudged, and decreed that a perpetual injunction be issued in this suit against the said defendants, John Dobson and James Dobson, according to the prayer of the bill.

By the court.

53 And afterwards, to wit, on the 31st day of May, A. D. 1882, the master in the case files his report and the testimony accompanying the same, which, being read, is as follows, to wit:

In the Circuit Court of the United States for the Eastern District of Pennsylvania. Of April Sessions, 1874, No. 2. In Equity.

DORNAN *et al. vs.* DOBSON *et al.*

To the honorable the judges of the said court:

The master duly appointed under the following decree respectfully reports:

Decree.

April 25th, 1876. This case came on to be heard on the pleadings and proofs, and was argued by counsel for the respective parties, and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed that letters patent for a design for a carpet pattern, No. 6822, dated August 19th, 1873, granted to Messrs. Dornan, Maybin & Co., assignees of Charles A. Righter, is a good and valid patent, being the patent referred to in complainants' bill, and that the said Charles A. Righter was the first and original inventor of the
54 design described and claimed in the letters patent, and also that the said defendants, John Dobson and James Dobson have infringed upon the said patent and the exclusive rights of the complainants under the same; and it is further ordered, adjudged, and decreed that the complainants do recover of the defendants, John and James Dobson, the profits, gains, savings, and advantages which the said defendants have received or made, or which have arisen or accrued to them from the said infringements of the said patented design, and also such damages in addition to said profits as the complainants may have sustained by reason of the said infringement; and it is further ordered, adjudged, and decreed that the complainants do recover of the defendants their costs and charges and disbursements in this suit, to be taxed; and it is further ordered, adjudged, and decreed that it be referred to John Cadwalader, Jr., Esquire, as master, to ascertain and take and state and report to the court an account of the gains, profits, and advantages which the said defendants have received, or which have arisen or accrued to them from infringing upon the exclusive rights of the said complainants by the manufacture, use, and sale of carpeting bearing said patented design, and also what damages in addition thereto have been suffered by the complainants by reason of said infringements; and it is further ordered, adjudged, and decreed that the complainants on such accounting have the right to cause an examination of the said defendants, *ore tenus* or otherwise, and also the production of the books, vouchers, and documents of the defendants, and that said defendants attend for such purposes before said master from time to time as said master shall direct; and it is ordered, adjudged, and decreed that a perpetual injunction be issued in this suit against the said defendants, John Dobson and James Dobson, according to the prayer of the bill.

55 The master was attended at his office, in the city of Philadelphia, by L. C. Cleeman, Esquire, for complainants, and Richard P. White, Esquire, for the defendants.

Testimony was taken both on behalf of the complainants and defendants, all of which has been printed, and will be returned to the court if it be so ordered.

The master finds that the complainants early in the year 1874 notified the defendants of their infringing their designs, and after a second notification the defendants wrote the following letter:

PHILADELPHIA, *May 25th*, 1874.

Messrs. DORNAN, MAYBIN & Co.

GENTLEMEN: We have your favor of this date, and note contents. We are not aware of infringing on any of your patterns. We, upon the previous notification, investigated this case throughout and found that we were not interfering with you or your pattern, and can only reiterate upon what was stated to you previously, that we are not making any carpet for which you hold letters patent, notwithstanding the proof you say you have, at 615 Chestnut street.

Truly yours, JOHN & JAMES DOBSON.

The defendants made and sold between 11th of February, 1874, and April 15th, 1876, together with one sale made after issuing the injunction in September, 1876, fifty-two thousand and forty-three and one-half yards (52,043½ yards). Of this total amount a very large proportion was sold to customers who had previously bought the genuine carpet of the complainants. Of these customers the principal ones were Field, Leiter & Co. of Chicago, who purchased of the defendants within the dates mentioned 15,682½ yards of the imita-

56 tion pattern. This Chicago firm had, within a few months preceding the manufacture by the Dobsons, purchased over 2,000 yards of the genuine carpet from the complainants. It was shown by the evidence taken by the examiner that the purchasing agent of the Chicago house, Dixon Bean, had taken a piece of the genuine carpet to the Dobsons and asked them to make something like it, and soon afterwards they issued the carpet decided to be an infringement.

Mr. James Dobson testified at considerable length to the fact that his firm had sold all of their ingrain carpets at prices which yielded them no profit whatever.

He analyzed the cost of manufacture, and, according to the figures given by him, his general statement that no profit accrued was satisfactorily verified by the details. Indeed, so far from any profit, it appeared from Mr. Dobson's testimony that they conducted their business at a heavy loss.

He states: "The bulk of these goods was made in 1874, and we sunk in that year, in manufacturing these goods (ingrain carpets), which we made almost exclusively, seventy thousand dollars in addition to the interest on our capital invested."

In the years 1874 and 1875 the Dobsons manufactured altogether

1,119,732 yards of ingrain carpets, so that about $\frac{1}{21}$ of the whole of their manufacture was of the infringing design. The remarkable popularity of this design is thus shown, as Mr. Dobson testified that they had made over 120 different designs in these years.

It was testified that designs for carpets were not of themselves of much value, rarely bringing in the designer's hands over $10. There was no testimony offered to show what the value was of a design that had been put in use and proved popular in the manufacture. From the figures already given, however, the extraordinary differ-
57 ence in their salability is apparent. It was conceded that usually difference of design did not vary the price; that is, carpets made of similar quality, and alike in materials and colors, brought the same prices, irrespective of design. The complainants had been for many years in the business, but the Dobsons had only begun to manufacture carpets in 1872.

The complainants asked to have awarded to them as damages and compensation for the injury inflicted upon them whatever profit the defendants may have made, and also whatever loss they, the complainants, had incurred, which could be measured by the profits that would have accrued to them if they had made the exclusive sales of the carpet, deducting in such case the amount of profits, if any, made by the defendants.

The defendants, however, contended that all that the complainants were entitled to was not what they, the defendants, had made or saved on the carpets, but only what they made or saved, by reason of the use of the pattern, as compared with what they could have made without it, and therefore, unless they could sell the carpet bearing the design, at a higher price than other carpets, whereby they made more or lost less, no profit resulted to them.

They further contended that unless it was shown by direct evidence that the complainants would have made the sales which the defendants did, had they not infringed, the fact could not be inferred. In support of these views the case of Seymour *vs.* McCormick, 16 Howard, 488, was cited. In that case the Supreme Court held, that in a suit for a violation of a patent for an improvement in a reaping machine, the improvement consisting principally in giving a convenient seat for the raker, that it was error to hold the defendant responsible in damages to the same extent, as if he had pirated the whole machine; and further, that it was error to lay down as
58 a rule for the measure of damages the amount of profits which the patentee would have made, if he had constructed and sold each one of the machines which the defendants constructed and sold.

The master does not think this case in point, when, as here, the inventor's profit consists in the exclusive use of the invention and in the monopoly of manufacturing for others to use. Judge Grier, who delivered the opinion of the court in Seymour *vs.* McCormick, explains this distinction in Livingston *vs.* Jones, 2 Fisher, page 209. He says in this this latter case: "The only cases in which the measure of the patentee's damages is the amount of the infringer's profit are, when the invention is of some new machine, or a new form of any

kind of known machine, which, as a distinct species of machine or manufacture, is more valuable or can be put into the market cheaper, so as to supersede or exclude other machines or manufactures of the same genus; and where the profit of the patentee consists in a complete monopoly of the right to make and vend the new machine or manufacture as a unit and in the exclusion of all other competition."

In the case of the Gorham Company *vs.* White, 14 Wallace, 511, it is held that a patent for a design is for the product, and not merely for the means of producing the result.

In that case, which was a design for silver table-ware, the great value of a successful design is shown. It was there testified, although the design was of the simplest character, that it was worth $50,000. This value was entirely the result of its additional salability, and had nothing to do with the intrinsic value of the article produced. The fact appeared in that case also that a very few designs, out of many issued, proved successful. From the tes-
59 timony of Mr. Dobson it appeared that more than one-half of all the ingrain carpets made by this firm, out of over 120 designs, was made upon 12 or 13 designs. It was, therefore, of the greatest importance to the defendants, if they hoped to contend successfully with the old established carpet manufacturers at the outset of their enterprise, to secure popular designs. From the published reports of other suits instituted and recoveries against them for similar infringements of patented designs, the defendants appear to have been very negligent, and to have disregarded the rights of patentees to an unusual degree. Proof of profits or evidence of direct loss is difficult to obtain. The fact here apparent was, that the defendants were willing to lose all present gain in order to secure custom and thereby future profits. It was testified that the complainants sold their carpet at from 10 to 15 cents a yard more than the Dobsons, and that upon the prices obtained by them their profit was, in the year 1874, 13¾ per cent., and in 1875, 10¾ per cent.

An equal profit might have been made by the Dobsons had they asked the same prices. By underselling they increased the injury to the complainants, and it would be manifestly unjust that a benefit should accrue to them from this additional wrong to the patentees.

In the Cawood patent, 4 Otto, page 710, Strong, J., says: "In settling an account between a patentee and an infringer of the patent the question is not what profits the latter has made in his business or from his manner of conducting it, but what advantage has he derived from his use of the patented invention." And in McComb *vs.* Brodie, 5 Fisher, Pat. Cas., 394, Wood, J., says: "The rule is not what defendant made by the infringement, or what he might have made, but it is the loss sustained by the plaintiffs by reason of the infringement. It is proper to inquire how many customers
60 were diverted from plaintiffs by the wrongful conduct of defendant, and what loss plaintiffs have sustained in profits by reason of such diversions."

Applying these authorities to the facts of this case, it seems that the Dobsons obtained very great advantages from the patented in-

vention; but instead of securing a money profit, they preferred to secure the trade. They, therefore, sold for less than cost when the similar carpet, at the same time and place, was bringing in other hands a fair profit. Had they made such a profit, it would properly belong to the complainants; and if they preferred to reap their profits indirectly, the benefit, gain, or advantage may be reasonably estimated as equivalent to the money profit they might have made.

The evidence clearly indicated that customers were diverted from the complainants. Field, Leiter & Co. had been large purchasers of this very carpet from the complainants; but after the Dobsons copied it, at the request of their purchasing agent, Dixon Bean, they became customers of the defendants, and bought more than one-fourth of all of this carpet which the Dobsons made. A witness, John W. Martin, testified before the examiner that a purchaser of the Dobson carpet had told him that he bought it because he could not get the complainants' carpet fast enough.

From the list of purchasers in evidence it appeared that many of the persons dealt with both firms, and it is only reasonable to suppose that the purchasing agents would visit both factories before deciding, and that they would select the cheaper article.

Mr. Dornan testified to the fact; he said: "We lost the trade of Field, Leiter & Co., and of others, through their being able to supply the Messrs. Dobsons carpet in place of ours."

This court, in the recent decisions in the cases of The
61 Bigelow and the Hartford Carpet Companies against the present defendants, has adopted a very reasonable basis in analogous cases, and which is applicable here, upon which the damage may be computed.

McKennan, Cir. J., in these cases says: "All that is left for presumption is that the infringing carpets displaced in the market the complainant's carpet, and, hence, that the profits which would have accrued to them upon the quantity of carpets put upon the market is the measure of their damages. This presumption as against a wrong-doer is not unreasonable."

In those cases it was shown that the infringers had made a profit in the carpet sold by them, and in that respect they differ from the present case. But the master is of the opinion that a reasonable profit could have been made by the defendants, and that, as the profits of the complainants were computed on a very fair basis, they can be accepted as the basis of what the defendants might have made. The presumption that the defendants' carpets displaced the complainants' carpets in the market is, perhaps, stronger than in the cases just cited, because the manufacturers were in the same city. Every presumption should be taken most strongly against the defendants. They wilfully and deliberately incurred the risk. They disregarded repeated warnings, and refused to accept the proofs that were offered them.

Ordinary prudence should have prevented their continuing the manufacture pending the decision of the question of the infringement. The demand for this particular carpet was so great that it is reasonable to suppose that the trade would have been compelled to

obtain the genuine design if the pirated article had not existed, and the master is of opinion that they lost all of this trade in consequence of such piracy. How far the complainants suffered
62 through the defendants' action in the loss of customers for their other carpets, considerable though it may have been, is too speculative to be estimated.

The master therefore awards to the complainants an amount, as shown in the following statement, equal to the profits they could have made in the years 1874 and 1875, respectively, in the carpet made and sold by the defendants, if they, the complainants, had made and sold it themselves.

By the complainant's testimony it was shown that their average profits for the year 1874 on these carpets was thirteen and three-quarters (13¾) per cent., and for 1875 ten and three-quarters (10¾) per cent., and that the average price per yard was more than one dollar.

By the testimony of Mr. Dobson and schedules offered in evidence it appears that the defendants made and sold 19,243½ yards in 1874, which would have yielded at one dollar a yard $19,243.50, and the profits of the complainants at 13¾ per cent. would have been $2,645.97. From the same testimony it appears that the defendants in 1875 made and sold 31,280½ yards, which at one dollar would have yielded $31,280.50, and at the rate of profit for that year, 10¾ per cent., the complainants would have made $3,362.65. There was no testimony as to the rate of profit in 1876, but as the amount of sales was unimportant in that year, the master has not included it in his award.

The master therefore finds and reports that the complainants, by reason of the infringemant by the defendants of their patented design for a carpet pattern No. 6822, dated 19th August, 1873, sustained damages to the amount of six thousand and eight dollars and sixty-two cents ($6,008.62).

Respectfully submitted.

JOHN CADWALADER, *Master*

We accept service of notice of filing this report.

L. C. CLEEMANN,
Att'y for Complainants.
RICH'D P. WHITE,
For Defendants.

April 21st, 1882.

63 *Testimony Taken before John Cadwalader, Jr., Esq., Master.*

In the Circuit Court of the United States for the Eastern District of Pennsylvania. In Equity. October Sessions, 1874. No. 2.

DORNAN *et al. vs.* DOBSON *et al.*

Present: L. C. Cleeman, Esq., for complainants; Richard P. White, Esq., for defendants.

JAMES DOBSON sworn:

Statement being shown witness, he is asked if he has examined it, and answers:

Yes; the statement contains the full number of yards of carpet

made in the pattern infringed; the statement was made by the book-keeper; I have not compared it, but I know it is correct; there was no carpet sold for cash not in the statement; I cannot state the colors of the carpets made, but the statement contains all the carpet we made of the pattern, of all colors; I have the knowledge of about the number of pieces made at the mills, independently of this
64 statement, which I believe to be entirely correct. (Statement here received and marked Exhibit A.)

I can state the profit made on these carpets without reference to my books. I arrive at it by our general mill statement. I have not this statement with me.

The profit made on the first item of the statement, Exhibit "A," was nothing. I arrive at this answer from the fact that there was no profit in any of the ingrain carpet which we have made up to this date. The bulk of these goods was made in 1874, and we sunk in that year, in manufacturing these goods, which we made almost exclusively, seventy thousand dollars, in addition to the interest on our capital invested. We sold no ingrain carpet at any higher price than that mentioned—namely, one dollar per yard—as to the first item. I mean all sales of ingrain carpets were at the same rates as stated in Exhibit "A" of the pattern infringed; there was no difference as to the price of patterns. Of course we sold three-ply at higher rates. Some patterns were sold more rapidly than others; that is always the case.

Q. Would you not make more profit on a pattern that sold readily than on one of which the sales were slower?

A. The profit would be the same exactly when the goods were sold; but we would manufacture more of the readily sold pattern, for the reason that it was in more demand. We do not make more than we want of a pattern that will not sell; we put something in that is better.

Q. In the calculation of profits on your ingrain carpets, you deducted the loss on those patterns that did not sell, did you not?

A. No, sir; they all did sell. We never made a pattern that would not sell. Some certainly sold more readily than others.

Q. Would you not lose more interest on those that did not sell readily than on those that did?

65 (Mr. White objects to the question, as being merely speculative.)

A. Of course, if we kept them over from season to season, we would. This we rarely did; we tried to close them all out during the season

Q. You sometimes sell a pattern at a reduced price to get rid of it, would you not?

(Objected to, as leading and argumentative.)

A. If it was damaged, or otherwise imperfect, we would.

Q. And you take all these things into consideration when you say you make no profit on the ingrain carpets you sold?

(Objected to, as founded upon a hypothesis having no basis for the inferences which the witness is requested to draw.)

A. During a season's business there might possibly be twenty pieces of various patterns upon which, to close out, we would concede a few cents—not exceeding five cents a yard—in the price; and from that, and our general business, I arrive at the cost of the goods.

Q. What I wish to know is, not what profit you made on your general ingrain carpet trade, but on each piece that is specified in this Exhibit "A" without reference to other patterns—please state that.

A. We made no profit on any piece mentioned in Exhibit "A." I wish we had.

Q. When you say this, do you mean on the account taken as a whole, and averaging the loss on some of the pieces and the gain on others, or do you mean you made nothing on each different piece, whether you sold it at one dollar or eighty cents per yard?

A. We did not make any profit on any piece mentioned in that Exhibit "A."

Q. If you had received one dollar per yard for every piece in that account, would you have made a profit?

(Objected to.)

66 A. That would depend altogether on the cost of the material at the time the goods were made.

Q. Say you had sold the goods on February 11, 1874, at one dollar per yard, would there have been a profit?

A. Not at that date, sir; there was no profit in them to us.

Q. Can you state the cost of materials at that date?

A. Not without reference to the books; the mill books will show the cost of all raw materials and the cost of manufacture.

(Mr. Cleeman calls for the books showing the cost of the raw materials, and the cost of manufacture, that went into the carpets bearing the pattern in suit.)

Cross-examined:

Q. Leaving out of consideration any loss of interest by reason of slow sale of particular patterns, and all loss by reason of damaged or imperfect patterns and consequent reduction of price, was there any profit on any of the goods made of the pattern in question?

A. No, sir.

Q. Will your books show the particular lots of material put into this particular pattern, or will they only show the prices you were paying for material used generally in your business at the dates when these goods were manufactured?

A. They will only show the price of materials generally used at that time, and not the price of material used for a particular pattern?

Q. Charging the material at the market rates, and the cost of making at what you actually paid, as of the date of the manufacture of each and every piece of carpet made on this pattern, was there any profit on any of it?

(Objected to, because the witness has already stated that he could not tell the prices of the raw material at the times indicated, without reference to his books.)

67 Answer to objection. No manufacturer can carry in his memory the exact market price at specific dates from year to year, but almost any manufacturer can tell whether he was making a profit on the goods that he was making it almost his sole business to manufacture at a specific time.

A. There was not any profit to us.

Re-examination:

Q. Was there any profit to anybody?

A. I can only speak for myself, but according to the report of the corporations there was no profit to any one.

Adjourned to April 19th, 1877, at 3.30 p. m.

THURSDAY, *April 19th*, 1877.

Present: Mr. White and Mr. James Dobson, and Mr. Cleemann with Mr. Dornan.

Mr. JAMES DOBSON'S re-examination continued. Statement produced by witness showing the prices of yarn sold at the dates therein stated, marked Exhibit "B."

Q. What was the cost for the manufacture of the ingrain carpeting you sold February 11, 1874, bearing the design in question, per yard?

A. The amount paid out for labor in February, 1874, would be at least 12¾ cents per yard; in addition to that there would be the cost of steam-power and wear and tear of the machinery, which would together reach one and a half cents a yard more; altogether the cost of manufacture would be 14¼ cents per yard at the date asked. We arrived at the amount, 12¾ cents, by taking the pay-roll of March, 1877, and in 1874 wages were higher than they are to-day; the additional one and a half cents per yard consists in the motive power, oil, bobbins, shuttles, and harness.

Q. Would no part of this wear and tear, as you call it, be included under the head of machinist, already calculated in your pay roll?

68 A. No, sir. The machinist is to keep the looms in running order, to repair breakage, &c. The 1½ cents per yard consists in furnishing reeds, bobbins, shuttles, harness, belting, picker-straps, and other incidentals which are liable to continually wear out, and which are not made by the machinist at our place.

Q. Please give a detailed statement of the items and the charges therefor by which you arrive at the price of 12¾ cents per yard for workmanship.

A. In reply to the question I submit the written statement marked Exhibit "C."

Q. Can you state the average weight per yard of the ingrain carpet sold by you in February, 1874, bearing the design in question?

A. Yes, sir. The average, when finished, was twenty and one-half ounces.

Q. What would be the cost per yard of the material in the carpeting spoken of at the rates given in the statement?

A. It would take six ounces of No. 12 worsted, costing 4⅞ cents per ounce, 28½ cents for the worsted in a yard of carpet. I arrive at this as follows: The worsted at 62 cents in the grease will shrink when in a dyed state ten per cent. It will cost for dyeing about seven cents per pound, making the cost of the yarn, in a dyed state, 76 cents a pound, or 4¾ cents per ounce. The double reel averaged say 43½ cents in 1874, and it would take one pound of double reel in a clean state to make one yard of carpet, which will cost fifty-seven cents per pound. I arrive at the cost of the double reel as follows: It will shrink on an average fourteen per cent. from scouring, that makes the cost fifty and three-quarter cents when scoured clean, and it will cost an average of 6¼ cents to dye, thus making the cost fifty-seven cents. This will give a weight of twenty-two ounces, the waste from winding, weaving, and finishing will reach fully one and a half ounces per yard.

69 Q. In making these estimates you have considered the filling as being made altogether of white wool, have you not?

A. Yes, sir.

Q. You did use black wool in the filling of the carpets in question, either in whole or in part, did you not?

A. I can't say we did; I don't think we did use any black wool.

Q. Can you ascertain this?

A. Yes, sir. I can say positively we used no black wool, nor grey wool; nothing but white wool went into these carpets.

Q. Does not the white wool purchased by you always contain some black or grey wool?

A. Not to any appreciable extent; there will be grey locks in it, that is all.

Q. Is then the profit, as you calculate it, the difference between what you sold the carpets at in 1874 and the cost of the various articles you have enumerated in your previous answers?

A. No, it would not, as the cost of selling and the trade discount would have to come off.

Q. Have you calculated trade discount in the price of yarns you have mentioned?

A. No, I have not, as yarns are not usually sold with a discount rate; they are usually sold for cash, at 30 or 60 days. McCallum's terms, whose basis we have taken, are usually 60 days, and there would be the interest, at 6 per cent., as to the length of time sold to fetch it down to cash, which would not average over one per cent. from the cost of the yarns. The carpets were sold at 90 days, three per cent. off for cash in ten days.

Q. To whom did you pay what you have called the cost of selling?

A. To our salesman, rent of the store, and other incidental expenses. The usual cost of selling carpets by regular commission houses

70 is from 7½ to 10 per cent., and we charged in the pencil mem. on Exhibit "A" five per cent. for commission and guarantee, which is considerable less than is charged by other commission houses as stated.

Recross-examined:

Q. You have stated the various items of cost entering into the making up of a yard of carpet, state whether, in your experience as a manufacturer, you have found, upon six months or a year's business, that you can produce goods within the limit of such calculations made upon paper, or whether an allowance is found necessary for leeway.

A. Our calculations have never come out accurate, the goods have always cost us more than we calculated.

Q. Has your calculation included any allowance for your own time and skill devoted to your business?

A. No, sir.

JAMES DOBSON.

Sworn and subscribed before me, this nineteenth day of April, 1877.

JOHN CADWALADER, JR., *Master.*

MAY 17, 1877.

ROBERT DORNAN sworn and examined by Mr. CLEEMANN:

I sold a large quantity of the carpeting bearing the design in question in 1874 and 1875, and sold some of it in the fall of 1873. I sold it all over the United States, largely in the West, a great deal in Chicago; we sold there, in Chicago, principally to Field, Leiter & Co. As near as I can remember, in 1874 we got $1.10 a yard, possibly in 1873 the price may have been higher, I am not positive. The average price during 1874 of our sales would be a little over $1.10. I can give the amount of this carpeting that we sold altogether. It was 430 pieces, averaging 120 yards to the piece.

71 Q. Please state what your profit on the carpeting thus sold per yard was.

A. That is a difficult question to answer. I can give the results of the business in the years in question, and average the profits of the carpets in question, and thus give the percentage.

Q. What is this percentage?

(Mr. White objects.)

A. In the year 1874 the net profits averaged over 13¾ per cent. after charging interest on capital, and deduction of five per cent. for depreciation of machinery and the bad debts incident to the year. In the year 1875 the net profits, calculated in the same way, except that we allowed 7½ per cent. for depreciation in machinery, were 10¾ per cent.

Q. Can you give us a calculation of profits in the same manner as they were calculated by Mr. Dobson at the last meeting?

A. I can give you the approximate figures; it would be very difficult to be accurate.

Q. State what was the cost of the carpeting to you per yard which you sold at $1.10 per yard in 1874.

A. As near as I can give the figures, the cost was 87½ cents in 1874, and the profit is, therefore, 22½ cents. This price of $1.10 is subject to the discount of 3 per cent. off for cash, thus reducing the profit to about 19 cents per yard. This, again, would be chargeable with interest on capital and depreciation on machinery, which I would estimate as follows: interest on capital at 6 per cent.——

Q. State the elements taken into consideration by you when you say the cost was 87½ cents.

A. My calculation is based as follows: 5 ounces of worsted, costing, dyed, 4½ cents per ounce, 22½ cents; one pound double-reeled filling, dyed, 50 cents; and the cost of manufacture, including wear and tear, 15 cents per yard. This only applies to the year 1874.

72 At what cost have you placed the cost of the worsted in that year, 1874?

A. Sixty-three and a half cents per pound in the grease, and the double reel at thirty-seven and a half cents per pound in the grease.

Q. What was the average weight of this carpet, when finished, per yard?

A. In this carpet it is safe to say twenty ounces.

Q. Did you calculate any loss from waste in the sum of 87½ cents given by you?

A. Yes; the waste is given at one ounce per yard; this the figures given will show.

Q. What did you allow for shrinkage?

A. Eight per cent. for the worsted and fourteen per cent. for the double-reel filling.

Q. How much for the dyeing?

A. Five cents per pound on the worsted and six cents per pound on the double-reel filling.

Q. Now, you have said that from the 22½ cents difference between the cost of the carpet and the selling price there was to be deducted three per cent. for cash interest on capital and depreciation in machinery; is there anything else to be deducted?

A. Not that I know of, except the bad debts.

Q. State, as near as you can, how much should come off per yard for these four items—discount for cash, interest on capital, bad debts, and depreciation in machinery.

A. I can only do this by taking our gross production in yards. I might make an estimate, but could not say it was an actual fact. I can only make the calculation by consulting my books.

Mr. Cleemann requests witness to make this calculation and give it at the next meeting.

73 JUNE 14, 1877.

Examination of Mr. DORNAN continued:

The last above written question being repeated, the witness answers:

As near as I can calculate, for the year 1874 those four items aggregated about seven cents per yard, reducing the profit to about fifteen cents per yard.

Cross-examined by Mr. WHITE:

Mr. White states that he has no questions to ask at present.

Mr. CLEEMANN re-examines witness:

Q. Did you notice any falling off in the sales of your carpets bearing the design in question, after the defendants introduced theirs upon the market?

(Objected to by Mr. White.)

A. We did lose some trade. We lost the trade of Field, Leiter & Co. and of others, through their being able to supply the Messrs. Dobson's carpet in the place of ours.

Cross-examined:

Q. Did you make any change in the quality of your carpet bearing this design?

A. We made two qualities simultaneously—extra super and super.

Q. Did you make both these qualities from the time you first used this pattern?

A. I think not from the very first; I think it was first made in the super quality.

74 Q. How long did you run on that quality alone?

A. I can't say exactly from memory, but the abstract of sales which has been made by our book-keeper will show. I have examined this abstract, and can now state that we made "super" only beginning in August, 1873, and we made the extra-super also from the beginning of September, 1873.

Q. Were those the only two qualities that you ever made in that pattern?

A. Yes, sir.

Q. What was the difference between the two qualities?

A. About fifteen cents per yard in price in the year 1874. I have not estimated the difference in cost of the super; but the difference in cost would be about the same; that is, fifteen cents.

Q. Have you included both these qualities in the amount of sales you have mentioned?

A. Yes, sir.

Q. On which of them has your estimate of cost and profit been based, which you have given?

A. The actual estimate has been made on the best grade, the "extra-super."

Mr. Cleemann offers a statement of carpets manufactured and sold by Messrs. Dornan, marked "Exhibit D, June 14, 1877."

MAY 24, 1877.

ALLEN CAMERON being duly sworn, examined by Mr. CLEEMANN:

I am a worsted and yarn spinner in the town of Westford, Mass. I have been in this business twenty-six or twenty-seven years. I sell worsted and yarns here in Philadelphia.

Q. Please state what the average market price of worsted was in 1874.

75 (Mr White objects, on the ground that it is not evidence of profits on the part of Mr. Dobson, nor of damages to Mr. Dornan.)

A. I shall take the standard of 14 of our worsted, and the average would have been 62½ cents. The usual difference between a "12" and "14" standard is five cents a pound less.

Q. What was the average market price of double-reel in 1874?

A. Of our standard, the price would have been about 37½ per pound of the standard of 120 yards to the ounce. The highest standard is 125 yards to the ounce; it runs down to less than a hundred yards to the ounce. Under 100, we think it a low standard.

Q. What difference in price was there in the standard of 120 yards and of 125 yards?

A. Very little difference; we would make no difference in the price to a customer who desired the larger standard.

Q. Were you familiar, in 1874, with the worsted and double reel of Messrs. John and James Dobson?

A. I was acquainted with the general character of the yarns made by them. Whether I actually saw the yarns made by them in 1874 I cannot say. I have some idea of the general character of their yarns previously to 1874. I never bought or sold their yarns, and did not, therefore, examine them with the same care as I would have done in other cases where I dealt in them. I have no knowledge of their yarns since 1874, as they no longer sell in the market. Previous to 1874, they competed in the market for yarns.

Q. How did their worsted and double reel compare in quality and value with that you have spoken of as being worth 62½ cents and 37½ cents respectively?

(Mr. White objects, because the witness states he did not know the character of yarn made by them at that time, and
76 that it does not follow that the yarn sold by them in the market was of the same character as that used by them in their own manufacture.)

A. The yarns of their standard of the worsted were of five cents less value than ours; the double-reel or filling yarn was worth two or three cents less than our standard.

Cross-examined by Mr. WHITE:

I do not know what the Messrs. Dobson got for their yarns, and can give no instance where they sold for five or three cents less than ours. I saw the yarns of Messrs. Dobsons, upon which I have made the comparison of prices, at Leedom, Shaw & Stewart's, prior to 1874, but I cannot give the precise date. Mr. Leedom and Mr. Stewart told me they were Dobson's yarn, that was my only means of knowledge. I am speaking of yarns, not any particular lot, that I saw at Leedom, Shaw & Stewart's. The yarns which I saw at Leedom and Shaw's were some that they stated they had purchased and some which were said to be samples, and these I certainly saw more than once. I cannot give the time when I saw any of these purchases or samples; I might approximate the times after some thought, but I cannot now do it. At present I can fix neither the month or the year. Mr. Stewart told me this was Dobson's yarn; he said nothing but a few remarks about the yarn; I recall no remarks of Mr. Stewart as to grade, size, or other distinctions of the yarn, but merely in comparison with the samples which I myself produced. I sold my yarn to those parties.

Q. What yarn did you sell and what price did you get?

A. I sold them "14s" worsted and double reel worsted, of the standard of 115 yards. We only made one quality of filling yarn, but the lengths varied; the stock was the same. Our yarns varied in price owing to the different qualities and colors put into it.

77 I happened to have my memorandum book in my pocket and from this I ascertained the average price of yarns in 1874, as stated.

(Mr. White asks to look at the memorandum book referred to, and witness produces it and explains its use to him.)

Q. Does that memorandum book contain the record of your sales in 1874?

A. Not all of them, some, perhaps not one in twenty. I have averaged the sales I have in this book to form an estimate with other means of information I have with me. I have not referred to my books; I have not my books with me.

Witness opens his book accidentally at April 15th, 1874.

Mr. White reads the first sale there "10,000 lbs of 14s," and asks:

Q. What is the price you sold that?

A. Sixty-seven and a half cents. The next sale is 10,000 lbs. of the same at the same price. I made a sale in April, 1874, of 5,000 lbs., to Leedom, Shaw and Stewart of "14s" at 67½ cents, also a second 5,000 lbs. at the same rate, and a third 5,000 lbs. at the same rate.

Q. Did you sell any double reel at that time?

A. Yes; I sold to Leedom, Shaw & Stewart double reel, three lots of 10,000 lbs. each, at 40 cents.

Re-examined by Mr. CLEEMAN:

The price of worsted fell after the dates mentioned.

Q. Please turn to a sale in your memorandum book at a lower price.

A. I made a sale to Messrs. Dornan in December, 1874, of white worsted, at 60 cents, and in September previous I made a sale of black to Messrs. Dornan at 57½ cents; the black was only 55 cents in December.

78 Recross-examined:

The difference between black and white was five cents a pound.

ALLAN CAMERON.

Sworn and subscribed before me, this 24th May, A. D. 1877.

JOHN CADWALADER, JR., *Master.*

HARTLY KNIGHT, being duly sworn, examined by Mr. CLEEMANN:

I am in the carpet business, a dealer in carpets. I have been in the business since 1857. My place of business is 1222 Chestnut street. I have handled goods manufactured by Messrs. Dobsons. I have handled their extra-supers to a small extent. I have handled carpets of the same kind of the Messrs. Dornan. There is a difference, on a comparison of the two manufactures as to quality, from ten to twelve per cent. in quality and salability in favor of the carpets of Messrs. Dornan. The inferiority in the carpets of Dobsons consisted in the quality of the material, and in the colors, which were not so bright as in the Dornan carpets. I cannot say which were the heavier carpets.

No cross-examination.

HARTLEY KNIGHT.

Sworn and subscribed before me, this 21st day of June, A. D. 1877.

JOHN CADWALADER, JR., *Master.*

THOMAS DEPUY, being duly sworn, examined by Mr. CLEEMANN:

I am a retail carpet dealer at No. 37 South Second street, Philadelphia. I have been, off and on, twenty-five years in the
79 business. I am familiar with the carpet of which the pattern is being litigated in this suit. I have had in my store the carpets of this pattern made both by the complainants and the defendants. I consider the quality of the carpets of Messrs. Dornan Brothers and Company fully ten per cent. better than those of Dobson's. I mean to say that I can get all of that difference in price easily at any time. I am not a practical carpet man—that is, not a manufacturer—and only speak of the difference in salability. I cannot say which was the heavier. The Messrs. Dornan had better colors in their carpets.

Cross-examined by Mr. WHITE:

The piece of Messrs. Dobson's carpets, of which I have spoken, I got of Boyd, White and Company; I cannot say whether I have had any other pieces of Dobson's make in my store or not; I did not know that the piece I have mentioned was Dobson's until after I had bought it. I refer to my testimony to one piece which I got from Boyd, White and Company; I do not know whether Boyd, White & Company manufacture carpets themselves; they do have them made to order. My knowledge that Messrs. Dobsons made the piece I have mentioned is derived from being told so by a gentleman not a salesman, but a dealer in carpets, who was in my store.

(Mr. White objects to the testimony given, as it appears to be hearsay.)

Re-examined:

It had a ticket on it; it was Boyd, White and Company's ticket, but not the ticket of the maker.

THOS. DEPUY.

Affirmed and subscribed before me, this 21st June, A. D. 1877.

JOHN CADWALADER, JR., *Master.*

80 BENJAMIN C. MARTIN, being duly sworn, examined by Mr. CLEEMAN:

I have been in the carpet business, as a salesman, for eighteen years; my place of business is No. 19 South Second street, Philadelphia, with J. C. Foulk; I am familiar, to a certain extent, with the carpet goods made by Messrs. Dobson; we have, I have handled their goods; I have handled a great many of the goods of the Messrs. Dornan; the Dobson goods are inferior in quality to the Dornan goods, in quality of yarn and in color; Dornan's goods will weigh, I should judge, an ounce and a fraction more to the yard than the Messrs. Dobson's; I weighed a piece of Messrs. Dobson's carpet on May 20th, 1877, bought of them in January, 1875; I found the yarn to weigh the weight of a ten cent piece less than twenty ounces; we have been getting about fifteen cents a yard more for Dornan's carpets than for Dobson's; I should judge the difference in price to be ten to fifteen per cent. in favor of Dornan.

Cross-examined:

I weighed the yard mentioned by request of Messrs. Dornan Brothers; the piece mentioned was bought direct from Messrs. Dobson in January, 1875; we were in the habit of buying from both firms, but only to a certain extent from Messrs. Dobson; the carpet weighed by me was supposed to be extra-super; it had been bought as extra-super.

Q. Was there any difference in the prices paid by you for the carpets of Dobson and Dornan?

A. That question I cannot answer exactly; the time has been so long since they were purchased that I do not remember; I think, however, the prices were the same from both.

Q. You continued to buy goods from Messrs. Dobson, did you not, until they refused to sell you any more?

A. I can answer this that the Messrs. Dobson have never refused to sell us goods; I purchased goods from them only a week ago.

81 Q. Did you say, upon your oath, that Messrs. Dobson did not refuse to sell goods to your house?

A. That question I could not answer, whether they refused to sell the house or not.

Q. How came you then, a moment ago, to state that Messrs. Dobson had never refused to sell goods to your house?

A. On the simple fact of my purchasing goods, from time to time, and only a week or ten days since I purchased an article there; I made no note of it, as it was a small matter; we received a bill for it; it was not a cash purchase.

Q. What was the article, and what was the amount of the bill?

A. The article I purchased a week or ten days ago was a beam or tufted mat, and the value one dollar and fifty cents.

Q. Be good enough to state any other purchase by your house of Messrs. Dobsons, since January 1st, 1877.

A. I could not state, as I am not in the purchasing department, except little matters, such as I have mentioned; you must go to the book-keeper for that.

Q. Do you mean to say that you, an experienced salesman, would not know if your house was selling Dobson's carpet?

A. I would know if they came in quanties, but not if they came in small lots.

BENJAMIN C. MARTIN.

Sworn and subscribed before me, this 21st day of June, A. D. 1877.

JOHN CADWALADER, JR., *Master.*

Mr. Cleeman calls for the defendants' books which show the price at which they sold double reel and worsted up to the time they ceased to sell the same.

Adjourned to 28th June, 1877, at 3.30 p. m.

82 JUNE 28, 1877.

Present: Messrs. Cleeman, White, Dobson, Dornan, and the master. Mr. Cleemann called Mr. G. D. Browley.

GEORGE D. BROMLEY, being duly affirmed, examined by Mr. CLEEMANN:

I am a carpet manufacturer, and have been fifteen years in business in York street, below Front street, Philadelphia.

Q. From your experience as a carpet manufacturer, what will be the waste from winding, weaving, and finishing a piece of ingrain carpeting per yard; that is, an extra-super piece?

A. I suppose one ounce per yard would cover all the waste.

No cross-examination.

GEO. D. BROMLEY.

Affirmed and subscribed before me, this 28th June, A. D. 1877.

JOHN CADWALADER, JR., *Master.*

In response to the call of Mr. Cleeman, Mr. Dobson produces his sales-books and the order-book covering the period named in the call.

James Dobson produres the order-book.

Mr. Cleemann proposes to read from it the entries from 30th October, 1873, the prices at which the defendants sold worsted and double reel.

Mr. White objects—

First. That the defendants did not begin to make the carpets in dispute until April, 1874.

83 Second. Because he objects to the reading of any of the entries until it is shown that the yarn referred to in them is the same that was used in the manufacture of the carpets in question.

Mr. Cleemann modifies his proposition to read the entries, so as to begin with the month of December, 1873.

Mr. Cleemann asks Mr. Dobson:

Q. Is the double reel and yarn mentioned in the entries of the same quality as that used in the carpets manufactured?

A. No, sir.

Q. Have you any books which will show the price of the yarn of the same quality as used in the carpets made on the infringed pattern?

A. Not in those years; in previous years I have. The entries in the order-book produced will show those prices in former years.

Q. Is the double reel and worsted, the sales of which are indicated in this book in the years 1873 and 1874, inferior to the worsted and double reel that went into the carpets in question?

A. The worsted is inferior and would not make the carpets in question; that is the quality we sold to carpet manufacturers who were making a cheaper grade of carpets. The "seven cut" mentioned would make the carpets—that is, it is of the same quality—but it would be too heavy for the carpets in question. The "five cut" and the "six cut" would not answer as it was a material used for cheaper carpets.

Q. Is the "seven cut" more expensive than that used in the carpets in question?

A. No, it is not so expensive; the yarn we used in our carpets cost more to spin.

Q. What would be the difference of cost in the two?

84 A. The difference in the market price would be 2½ cents a pound more for the quality we used.

Mr. Cleemann, subject to the objection of Mr. White, reads the entries as follows:

1873, Dec. 2. Thomas Boyland, 1 S'k, "5 cut D. reel," at 37½ cts., at 90 days,
" " " " " "6 cut " " " "
" " " 4 " "7 cut " " " "
" " 10. Evans, Deitz & Magee, at 3 mos. from Jan. 1, '74 3,000 lbs. white worsted 12's, at 55 cents, with privilege of taking 5,000 or 6,000 lbs. D reel, at 37½ cents.

(Mr. Dobson — that the cost increases with the number of cuts.)

1873, Dec. 22 Jas. Galbraith & Bros. (3 per. cent. off in 10 days,) 1,500 12's white worsted, at 55 cents.
" " 23. Jas. Hobb, (3 per cent. off in 10 days,) 4,000 "7 cut D. reel," at 37½ cents.
" " " " " " 1,000 "6 cut D. reel," at 37½ cents.
" " " " " " 3,000 12's white worsted, at 55 cents.
1873, Dec. 26. Artman, Treichler & Co., (½ note at 90 days, ½ 4 mos., adding 1 month's interest,) 10,000 lbs. 12's white worsted, at 55 cents.
1874, Feb'y 23. Jas. Hobb, 5,000 lbs. 12's white worsted, at 60 cents.
" " " " 5,000 lbs. "7 cut double reel," at 40 cents, at 90 days.
1874, Apr. 27. Leedom, S. & Stewart 5,000 lbs. "7 cut D. reel," at 40 cents, at 90 days.
1874, May 15. John Boggs, (4 mos. from 1 June,) 10,000 lbs white worsted yarn, at 55 cents.
1874, June 2. Shegog & Clark, 5,000 lbs. 12's worsted, at 55 cents, at 4 mos.
" " " " 4,000 "6 cut D. reel," at 40 cents.
" " " " 1,000 " 5 cut " "
1874, June 2. Coans, D. & Magee, 5,000 lbs. 12's white worsted, at 55 cents.
" " " 15,000 lbs. "5, 6, & 7 cut D. reel," at 40 cents.

Q. Please give the entries which show sales of yarn of the same quality as went into the carpets in question?

A. I can only show you the quality of the worsted from this book. All that was made up to 1872 was of the best quality, and equal to that used in the carpets in question; I therefore refer to any entry prior to 1872. In 1872 we commenced to make carpets, and we had not combing machinery sufficient to comb all the wool that we could spin into worsted. We combed sufficient for our own use at the mill, the balance we made carded worsted, and sold in the market what surplus we had after that date. The difference between carded and combed worsted is this: Combed worsted—all the short wools and what we call noils is separated from the long fibres, the long fibres was then made into worsted—making out of 100 lbs. of good worsted wool 60 lbs. of worsted; the balance would be short wool or noils. While carded worsted—the long and short wool is not separated, but worked together, and out of 100 lbs. of that wool we would make about 90 lbs. of worsted—87½ to 90 lbs. The worsted so made is poorer, and not even, nor was it strong enough to make into the goods in question, but was sold to parties who made a cheaper grade of goods. Those are the parties of whose entries Mr. Cleemann has read. The result is, that the yarn was cheaper; it was fully from 5 cents to 7½ cents a yard cheaper, and does not cost as much to make by 7½ cents a pound.

85

Q. Do these remarks apply to the 10,000 lbs. sold to Artman, Treichler & Co. on 26th Dec., 1873?

A. Yes; they apply to all sales after 1872, and to some of the sales of 1872. This refers to worsted.

Q. Do you state that, prior to 1872 and during 1872, you sold worsted like this in the entries read, from 5 to 7 cents a pound less than the worsted like the worsted you put in the carpets in question?

A. At the time mentioned we did not make the cheaper grade of worsted, and consequently could not sell it at any price.

Q. How did you then compute the difference of value?

86 A. The best quality of worsted suitable for making extra-super carpets, must be made out of long combed wool, without short wool or noils. Such wool will yield 60 per cent. of good worsted, while carded worsted will yield the whole, except the waste which is about 10 per cent.; consequently we get 90 per cent. in one case, and 60 per cent. with the short wool in the other; and this makes the difference.

Q. How about the double reel in the entries read to the master—is that as good as the quality in the carpets in question?

A. The material in the "7 cut" double reel mentioned is as good as the material in the carpets in question; but the yarn is not so fine, nor would it be worth within 2½ cents a pound as much as that used by us, on account of the length and fineness; to spin it to that fineness we had to put a little finer wool with it.

Q. Do these remarks apply to the 5,000 lbs. of "7 cut" sold to Leedom, Shaw & Stewart?

A. Yes, sir.

Q. If there is a difference in the value, why do you sell at the same date 5, 6 and 7 cut D. reel at the same prices?

A. 5 cut double reel is not near so valuable as 7 cut, made out of poorer material, the yarn being so much heavier; the 6 cut is a little better than the 5, and the 7 is better than the 6; and parties making a cheaper grade of carpet wish a little of all of them, and we make the prices at an average of all; the 5 cut alone would not be worth more than 35 cents, while the 7 cut would be worth 40; but parties prefer the 5 cut at times for their work, and we sell it therefore at the same price; the grades mentioned in the entries as 5, 6, and 7 cut are not full standard, but were made to meet a demand of the Kensington manufacturers; they would measure three-fourths to a cut less than they were called; what we used in our own carpets is from 7 to 7½ cut full.

Q. How many yards will the 7 cut run to the ounce that you used in the carpets in question?

87 A. Sixty-five yards; that sold to Leedom, Shaw & Stewart will run from 53 to 55 yards.

Adjourned to 3d July, 1877.

3D JULY, 1877.

Mr. White not appearing, adjourned.

JULY 6TH, 1877.

The order-book of Messrs. Dobson is handed to Mr. James Dobson, and he is asked by Mr. Cleeman to refer to the date of January,

1872, and state if there is any higher charge entered there above the rate of 62½ for double reel. Please give the entries for double reel in January, 1872.

A. The double reel is entered always at 57½ cents, and the worsted is entered at 72 cents, during the whole of January, 1872.

Q. Turn to July, 1872; what are the prices there?

A. In July, 1872, double reel, 54 cents, 52½, 52½, and 54 cents, 53, cents, 54 cents, 53½, 54, 53, 54, 54, 54, 53, 54, 53½, 53½, 54, 54. The worsted, all 12's, entries are 82½, 85, 85, 85, 85, 85, (black worsted 80), 85, 85, 85, 85, 85, 85, 85, 85, 85, 85, 85, 85, 85, 85.

Q. Turn to the year 1873 and give the entries for January and July in the same way.

A. In January, 1873, the quality of worsted charges, double reel, does not change at all. January, 1873, double reel, 50, 50, 50, 50, 50, 50, 50, 50, 50, 50, 50, 50, 50, 50, 50.

Q. Please give the highest price obtained by you in the year 1872 for double reel.

A. Sixty cents was the highest price obtained for double reel in 1872 (and 90 cents for worsted).

Q. Continue the entries of double reel for 1873.

88 A. February, 50, 50, 50, 50, 50, 50, 50, 47½ (net cash). March, 47, 48, 47, 47½, 47, 45, 47, 46, 45, 46, 45, 46, 45, 45, 46, 44, 45, 42½, 42½, 44. April, 42½, 45, 43, 43, 43, 43, 43, 42, 42½, 42½, 42½, 42½, 42½. May and June, 42½, 42½, 42½, 42½, 42½, 42½, 42½, 41½, 42½, 42½. July, 42½, 42½, 42½, 42½, 41, 42½, 41, 40, 41, 42½, 40, 40, 40, 40, 42½, 40, 40, 40, 40, 40, 42, 40, 40, 40, 40, 40, 40, 40, 42½, 40, 40, 40, 40. Job lot, September 30, 1873, to Judge Bros., at 35 cents, 40, 40, 38, 37½, 37½, 37½, 40, 87½, 37½, 37½, 37½, 37½, 37½, 37½.

Q. Take 1874 in the same way for double-reel.

A. Jan'y 10, 1870, 40, 40, 40, 40, 40, 40, 42½, 42½, 40, 40, 40, 41½, 41½, 42½, 42½, 41½. Sept., 1874, 37½, 37½, 37½, 38¾, 40. Next entry August 2d, 1875, at 37½, a special order; there is another entry in May, at 37½. The worsted would change the quality from about the middle of 1872.

Q. Now compare the year 1869, as to worsted and double reel, with McCallum's statement.

A. Worsted, 77½, 77½, 80, 77½, 77½, 77½, 77½, 77½, 77½, 77½, 77½, 87½, 77½, 77½, 77½. July, 77½, 77½, 77½, 77½, 75, 76, 75, 75. Double-reel—

Mr. Dobson states that in 1873 and 1874 they did not sell their yarn at the market value, because of a combination of the carpet manufacturers of Philadelphia to buy yarns elsewhere, as we were about competing with them in making carpets, and they would not buy our yarn unless we sold it cheaper than elsewhere. The combination was formed, I think, in 1873, or early in 1874; a meeting of the carpet manufacturers was called for the purpose—our heaviest customers were in it.

ROBERT DORNAN re-examined:

Q. How much less profit did you make in 1875 than in 1874 on the carpet in question per yard?

(Objected to by Mr. White as irrelevant.)

A. The profit on the carpet in 1875 was about three cents per yard less than in 1874.

89 Q. How much would a yard of carpet weigh in which the double reel ran 65 yards to the ounce?

A. That would depend on how much the yarn wasted in the scouring and what the weight of the worsted chain would be; basing the shrinkage of the double reel at 14 per cent., and allowing 6 ounces of cleaned worsted to the yard, a yard of carpet, when finished, would not weigh over 18 ounces.

Cross-examined by Mr. WHITE:

Q. You said before, I believe, that you could not give the exact cost of your carpet or the exact profit made upon it?

A. I did give a computation of the cost as I could possibly get at it, or as near as anybody could.

Q. Did I not understand you to say, sir, that was merely an estimate, and that you could not undertake to give exact figures?

A. I stated that it was impossible for anybody to give the exact cost of a yard of carpet, but, after consulting our books, I made a statement of the cost, which is as near right as anybody could make it, there are so many contingencies that are merged into the cost of a single yard. I will say, further, that I hold that it is impossible for anybody to give an estimate of the cost that may not be astray a fraction of a cent over or under.

Q. You have said that your estimate was based upon an examination of your books; will you please state exactly in what way you get the cost of a yard of carpet from your books?

A. I had recourse to the books to find the specific cost of the materials entering into the carpets at specific times, to which cost I added the manufacturing expense, in determining the cost of the fabric.

Q. Did you make or purchase the yarn you put into these carpets?

A. We did both.

90 Q. Please state which of your books you consulted, and to what entries you referred for the cost of the yarn which you used in manufacturing this carpet.

A. The book consulted was the invoice-book, and the items were the items of purchases for 1874.

Q. Did that show the cost of the yarn made by you?

A. No, sir; the computation of the cost was made up from the cost of the purchased yarn, taking that as a basis.

Q. Whom were these yarns purchased from?

A. I can only tell by consulting the invoice-book, largely though from the "Abbott Worsted Company," Graniteville, Mass., and other parties.

Q. Did you use that yarn exclusively in the manufacture of any of this carpet?

A. No, sir; there was a cheaper yarn that actually went into the carpet; but my computation did not include that cheaper class of yarn.

Q. Had you not to use your own better yarn with the "Abbott yarn"?

A. Our yarn did not cost any more than what we bought of the Abbott Worsted Company, as I judge they made a profit on the yarn we bought.

Q. Question repeated.

A. We did use our yarn with the Abbott yarn.

Q. In what proportions?

A. I can't say; we used most of our own. Formerly we had made the same quality of carpets entirely of the "Abbott yarn."

Q. When did you make carpets of Abbott yarn exclusively?

A. I can't give the exact time, but it was prior to our doing our own spinning.

Q. Please give the time as near as possible.

A. I can't say positively, but as near as I can remember it was in 1871 or 1872 that we begin to spin our own yarn. Prior to that we used the Abbott yarn exclusively.

91 Q. It was the price of the "Abbott" yarn on which you said you made your calculation?

A. Abbott and others, I said.

Q. Now, sir, what is the market value of your own yarn as compared with the Abbott yarn?

A. At that time our yarn was a better yarn and was probably worth, in the market, 2½ cents per pound more.

Q. Did you use the Bigelow yarn in this carpet?

A. We did not use any of it in this carpet.

Q. If I understand you, you estimated the yarn at the prices you paid; will you now state how you arrived at the manufacturing expenses?

A. I arrived at it by computing all the items of expense and the waste, warping, winding, spooling, finishing, &c.

Q. Is there any where upon your books any memorandum or any system of getting at the cost of a yard of carpet?

A. The cost of a yard of carpet from our books can only be determined as I have given it; there are no means by which we can determine the exact cost, as I have before stated.

Q. Then you took what you were paying for the materials and what you were paying for the manufacturing expenses, and made the best guess you could at the cost per yard?

A. I made no guess whatever as to the cost; my calculation is as nearly accurate as anybody can make it who is engaged in the business.

Q. In calculating the cost, did you calculate the 2½ cents extra which you say your yarn is worth over what you bought?

A. I have said that the calculation was based on the price of yarn which we bought, and that our own yarn did not cost more than what we bought. The reason we bought yarn was that we did not at all times make sufficient of our own.

Q. Do your books show the cost of your own yarn, or is that also an estimate?

92 A. The books do not show the cost of the yarn. It is in the

power of a manufacturer who understands his business to estimate the cost of yarn or carpet within a fraction of the actual cost; and it is my business to buy the wools and to contract for the spinning of the yarns, so that I am competent to speak of the cost.

Q. Have you no computation on your books of the cost of yarn prior to its going into the carpets?

A. No, sir; excepting the general estimate that is always made up, taking into consideration the cost of wool and its shrinkage, and the cost of its spinning. I would say that we are not in the business of selling yarn, and, therefore, it is not so necessary to make an estimate.

Q. Don't you make any entry of the wool when it is given out to be spun?

A. We have a delivery-book, in which we mark the wool which goes out to the spinner.

Q. Have you not an entry which shows the amount of yarn you get back for the wool?

A. Most assuredly we have—in a book, in which we give the spinner credit for the yarn returned.

Q. Are those the only entries which you make of the yarn before it is put in the carpet?

A. Yes, sir.

Q. Be good enough to tell me how you came at the diminution of about 3 cents profit per yard in 1875 from 1874?

A. By the difference in the cost of the material.

Q. You have not explained how you arrived at that reduction.

A. I made a computation for 1875 as I had done for 1874, and had it at a previous meeting, but it was not desired. I can make it again.

Q. Just state what books you used in making this computation?

93 A. I have stated that I used the invoice-book for the cost of the materials, and the wages-book and the pay-roll to determine the cost of manufacture.

Q. Please produce at the next meeting the computations for both years of 1874 and 1875.

Adjourned to Tuesday, July 10, 1877, 3 p. m.

JULY 10, 1877.

Cross-examination of Mr. ROBERT DORNAN continued:

Mr. Dornan produced a paper marked "Exhibit E," containing the computations for the years 1874 and 1875, called for by Mr. White at the last meeting.

Q. Is the price which you give here—4½ cents per ounce for Abbott—what you gave during the whole year 1874?

A. It is the average. I ascertained the average by taking the total invoices, the different prices for the year, and averaging them.

Q. Did you purchase this yarn ready for weaving?

A. The yarn had to be scoured and dyed before weaving. I purchased it in the grease.

Q. What did it cost you in the grease?

A. The average cost in the grease was 63½ cents per pound.

Q. Then in the price you give here, (Exhibit E,) you state, not the average of what you bought it at, but your estimate of what it cost you after you dyed and scoured it and deducted the waste from it?

A. The price has those deductions in that statement. I mean that those matters are added to the cost in the statement rendered.

Q. The allowances for shrinkage and dyeing are a matter of estimate with you, are they not?

A. They are a matter of fact, though the item of shrink-
94 age varies a trifle, probably one per cent. The shrinkages estimated there are a fair average.

Q. Be good enough to give me a direct answer, whether the allowance for shrinkage and dyeing *is*, or *is* not, an estimate?

A. To the best of my knowledge it is an *actual* estimate of the shrinkage; I mean the actual amount of shrinkage, and the actual cost of dyeing.

Q. Now, if you have any means of getting from your books the actual amount of shrinkage and the actual cost of dyeing otherwise than by estimating it, please state how it is done, and which of your books will show it?

A. Our dyeing book will show the actual loss on the yarn, but the different makes of yarn are not particularized. The cost of dyeing is ascertained by taking the jobber's prices for dyeing the different colors entering into this carpet in question: 10 cents per pound for the scarlet, 3 cents per pound for the white, five cents per pound for the other colors. These are the prices for dyeing the filling; the worsted is the same, with the exception of the scarlet, which is 9 cents, instead of 10 cents.

Q. Does your yarn book show what particular yarn was used in this special carpet, and your loss upon it, as distinct from your other business?

A. No, sir; the yarn was in general use in all the patterns.

Q. How many sorts and makes of yarn did you use in those two years, 1874 and 1875?

A. We used various sorts, to wit, worsted, double-reel white filling and single grey filling; I cannot specify the makes—there were a number. I can mention "Abbott Worsted," "Saxonville Worsted," "Abbott Double-Reel," our own make of "Double Reel," and Job Batty "Single Grey." There may have been others, but I am not positive.

95 Q. Is there not a considerable variance in the shrinkage and loss upon these different varieties of yarn?

A. Yes, sir, there is.

Q. Do you still persist in saying that you took the actual loss of waste and cost of dyeing, and not an estimate of what you considered it to be?

A. I do.

Q. If you used these different varieties of yarn, and there was a variance as to the shrinkage on each, and your yarn book did not keep

any separate account of the different kinds, will you be good enough to tell us how you got at the actual shrinkage of the yarn used in these carpets?

A. I stated that the different sorts of yarn varied in shrinkage. The same make of worsted will nearly always shrink the same, and the same is true of double-reel and single grey. The yarn book shows the varieties, though not the different makes, and the shrinkage given is made up of the actual losses on those yarns, without regard to who made them.

Mr. White repeats his last question.

A. I cannot answer the question more plainly; the answer is fully as plain as the question.

Q. Now, what is the difference in price between the New England yarn and the Abbott yarn?

A. I presume you mean the Saxonville yarn. (Mr. White says "yes.") The Saxonville yarn cost us 5½ cents per pound less than the average cost of the "Abbott yarn."

Q. How many ounces of the Saxonville yarn would it take to make a yard of this extra super carpet?

A. We never used it alone in this carpet, but I should say that six ounces of dyed worsted would be adequate for a yard.

Q. Be good enough to tell us what you paid a pound for that Saxonville yarn.

A. I am not absolutely sure, but nearly so, that it was 58 96 cents per pound. We made but one purchase in the year 1874; I can produce the invoice. I can only state from memory that the purchase was in 1874. That yarn was bought on three months' time.

Q. How many picks to the inch do you put in your carpet?

A. Thirteen pairs, or twenty-six picks.

Q. What makes of double-reel filling did you use in this carpet?

A. Abbott double reel and our own make.

Q. Can you tell us how much of each you used?

A. Most largely our own; I cannot give the exact amounts. We only bought the Abbott to eke out when we were short of our own.

Q. The third item in your statement is: "The cost of manufacture, including wear and tear, fifteen cents." Is that an estimate, or is it the actual cost as ascertained from your books?

A. It is both, in part. The weaving is taken from the books and the other part is estimated. The part for the loom-fixer, the machinist, winding, spooling, and finishing are estimated. It is impossible for anybody to get at the exact cost of those items.

Q. What was the cost of weaving which you allowed?

A. I think it was seven cents per yard in 1874, and six cents in 1875.

Q. Are these the actual cost in those years?

A. If the amounts given are right, they are the actual not estimated cost.

Q. Were these carpets all woven by steam-power?

A. No, sir; they were not—some by hand and some by power.

Q. What did you pay for hand weaving?

A. I am not positive, as I have not consulted our wages-book for the hand weaving.

97 Q. How came you then to state that the figures you gave us were the actual cost for the making of this carpet, when it appears that you have not consulted your books for one of the elements of it?

A. The figures that I have given are the actual figures so far as they apply to the power-loom weaving. The difference in the cost of weaving by hand would be fully offset by the difference in the cost of the single grey filling entering into the manufacture of this carpet, which has not been computed in the statement.

Q. Do you not use the same materials in your power-looms as in your hand-looms?

A. Yes, sir; precisely.

Q. Now, as a carpet manufacturer of many years' standing, do you say you cannot give us the difference in cost of hand weaving and power-loom weaving in your own goods?

A. I can only do it to-day from recollection.

Q. Please do so?

A. As near as I can, I should say two cents a yard more for hand than power weaving in 1874. There are elements of cost in power-loom production that do not enter into hand weaving; I allude to loom-fixers' wages, mechinists' wages, and a decreased wear and tear in hand weaving.

Q. Now state, if you please, what you paid per yard in 1874 and 1875 for power weaving and for hand weaving?

A. I can only answer upon referring to my books, to be accurate.

Q. Tell us what you are paying to-day for hand and for power weaving?

A. Six cents by power, and fourteen cents by hand.

Q. Has there been any marked difference in the proportions from the years 1874 and 1875 and the present time?

A. I think the prices in 1874 were seven cents for power and fourteen by hand, as near as I can remember.

98 Q. Can you tell us what proportion of this carpet was made by hand and what by power?

A. I can only be accurate by referring to the books; I think by far the largest portion was made by power. My books will show.

Q. The next item you mention is "designing." What have you allowed for designing, and how do you get at it?

A. Designing is charged into the wages, and it was impossible for me to get at the actual cost for a single yard, I therefore estimated the cost per yard of the several items of designing, spooling, winding, finishing, and wear and tear. My cost of the manufacture is above the defendants' estimated cost.

Q. Please give us what you allowed for the respective items mentioned.

A. I have stated before they were lumped together and estimated.

Q. Then you can't give us an intelligent estimate as to what pro-

portion of this "fifteen cents" was allowed for either one of those items?

A. No, sir; it would be impossible to give it accurately or otherwise.

Q. Don't you know what the winding costs for a yard of carpet?

A. No, sir; nor does anybody; nor the spooling, accurately. I can give approximate estimates of them all as follows:

Spooling, $\frac{1}{3}$ of a cent a yard.
Winding, one cent "
Loom fixing, two cents "
Pickers, one cent "
Machinist, one cent "
Designing and card cutting, one-half cent a yard.
Wear and tear, one cent.
Finishing, one-half cent.

99 Q. Now, Mr. Dornan, how do you get at the amount of designing and card-cutting?

A. By estimating. We pay our designer $1,200 per annum; in addition to that, we pay for cards, and for cutting we pay a hand six dollars per week. I don't know what the papers cost, my estimate was merely a guess.

Q. About how many yards of carpet do you make in a year?

A. We have varied, in different years, from 2,500 to 3,500 pieces, averaging 120 yards a piece. I think we made about, or over, 3,000 pieces in 1874 and in 1875; rather more in 1874 than 1875; they were fair years. I think, in 1871, we made as high as 4,000 pieces; that was a verd good year. We made about 2,500 pieces in 1876; we will make more this year; probably 3,000 pieces this year.

Q. How many patterns did you introduce in 1874 and 1875?

A. I cannot say; a large number, though. It is our custom to bring out new patterns every season.

Q. Do you use any patterns other than those of your own designers; do you ever buy any patterns?

A. No, sir. We possibly may have bought one or two in the past 5 years; we bought one or two from a Frenchman, who came over here with sketches.

Q. Why did you make that exception to your general rule?

A. Probably because we thought there was merit in the design.

Q. What is the most you have ever paid for a design for this class of carpet?

A. I think we have never paid over $20, and have paid as low as $10. We run some patterns one season, some two, some many years. The "Henry Clay" pattern has run since before I was born, and the "Eagle Head" is another old stand-by.

100 Re-examined by Mr. CLEEMANN:

Q. Many designs that are produced are worthless, are they not?

A. Many are not worth the paper they are designed on.

Q. Now, sir, you have said that in estimating the cost of manu-

facture of carpet you can't give the actual cost of many of the items that go to make the entire cost, but are mere estimates. How far do these estimates vary from the true cost; I mean what is the greatest possible variation in these estimates?

A. They might possibly vary ten per cent. on each item, more or less.

Q. You have said that your profit on a yard of carpet was 15 cents in 1874. Now, within what limits is this true?

A. It is as nearly true as it was possible for me to make, taking the amount of money made in the year, putting it into percentage on the amount of business done. Another way of estimating it was, taking the cost of the fabric, and taking the difference between the selling price and the cost, less seven cents per yard, which amount covered interest on capital, bad debts, and depreciation of machinery. The fifteen cents given by me is within one-half cent of being accurate either one way or the other.

Recross-examined by Mr. WHITE:

Q. You refer, Mr. Dornan, to the selling price of your goods; you have stated that you had two grades, "super" and "extra-super;" was the price the same for those grades irrespective of pattern?

A. Yes, sir.

Adjourned to 4th September, 1877.

101 EXHIBIT A.

		Name of Purchasers.	No. of yds.	Price per yd.	Total.
1874.					
Feb.	11.	Field, Leiter & Co.	119½	1 00	119 25
	18.	"	116½	1 00	116 50
	21.	"	111½	1 00	111 50
	26.	Foster Bros.	116	1 02½	118 90
	27.	S. N. & H. W. Foster	113	1 02½	115 82
Mar.	4.	Field, Leiter & Co.	114½	1 00	114 50
	10.	"	108½	1 00	108 50
	11.	"	105½	1 00	105 50
	"	Jordan, Marsh & Co.	113½	1 02½	116 33
	17.	Field, Leiter & Co.	111½	1 00	111 50
	18.	"	112½	1 00	112 50
	23.	Hager Bros.	107½	1 04	111 80
	25.	Field, Leiter & Co.	108	1 00	108 00
	28.		107	1 00	107 00
April	1.		112	1 00	112 00
	3.		107	1 00	107 00
	7.		106	1 00	106 00
	8.		106½	1 00	106 50
	11.		212½	1 00	212 50
	16.		116½	1 00	116 50
	18.	A. T. Stewart & Co.	115	1 00	115 00
	20.	Field, Leiter & Co.	227	1 00	227 00
	22.	"	109	1 00	109 00

		Name of Purchasers.	No. of yds.	Price per yd.	Total.
1874.					
April	22.	A. T. Stewart & Co.	115½	1 00	115 50
	24.	Field, Leiter & Co.	105½	1 00	105 50
	25.	"	217½	1 00	217 50
	"	A. T. Stewart & Co.	106½	1 00	106 50
	28.	Field, Leiter & Co.	107½	1 00	107 50
	29.	"	109½	1 00	109 50
102					
	29.	Lord & Taylor	116	1 00	116 00
	30.	A. T. & Co.	111½	1 00	111 50
	"	Field, Leiter & Co.	99½	1 00	99 50
May	1.	"	103½	1 00	103 50
	4.	A. T. Stewart & Co.	114	1 00	114 00
	"	Field, Leiter & Co.	114	1 00	114 00
	5.	A. T. Stewart & Co.	116½	1 00	116 50
	6.	Field, Leiter & Co.	207	1 00	207 00
	"	J. Kenard & Sons	116½	1 00	116 50
	8.	John Shillits & Co.	111½	1 00	111 50
	"	Artman, Dillinger & Co.	110½	1 02½	113 26
	"	J. Reigel & Co.	112	1 00	112 00
	"	Artman, Dillinger & Co.	96½	1 02½	98 91
	9.	Field, Leiter & Co.	110½	1 00	110 50
	12.	"	112	1 00	112 00
	13.	"	110	1 00	110 00
	13.	Flint & Co.	108	1 00	108 00
	"	J. Reigel & Co.	112½	1 00	112 50
	15.	Adams, Mansur & Co.	112½	1 00	112 50
	15.	Adams & Meldrum	107½	1 00	107 50
	16.	Field, Leiter & Co.	318½	1 00	318 50
	19.	J. Reigel & Co.	122	1 00	122 00
	20.	Schwartz & Graff	204½	1 00	204 50
	22.	Field, Leiter & Co.	108	1 00	108 00
	"	J. Reigel & Co.	95½	1 00	95 50
	23.	Field, Leiter & Co.	111	1 00	111 00
	25.	Marrett, Bailey & Co.	106½	1 00	106 50
	"	"	122½	1 00	122 50
	26.	H. B. Weber & Co.	118	1 02½	120 95
	27.	Field, Leiter & Co.	110	1 00	110 00
	28.	Adams, Mansur & Co.	118	1 00	118 00
	"	J. & R. H. Fiddick	99	1 05	103 95
	30.	Barnes, Bancroft & Co.	95½	1 00	95 50
June	4.	J. Kennard & Sons	115	1 00	115 00
103					
	22.	Adams, Mansur & Co.	118	1 00	118 00
July	1.	Field, Leiter & Co.	229½	1 00	229 50
	7.	Artman, Treichler & Co.	241	1 00	241 00
	8.	Field, Leiter & Co.	458½	1 00	458 50
	"	J. Reigel & Co.	120	1 00	120 00
	10.	Artman, Treichler & Co.	97½	1 00	97 50

		Names of purchasers.	No of yds.	Price per yd.	Total.
1874.					
June	13.	Field, Leiter & Co.	246	1 00	246 00
	"	Adams, Mansur & Co.	115	1 00	115 00
	"	Field, Leiter & Co.	462½	1 00	462 50
	"	Harris, Chipman & Co.	1134½	1 00	1,134 50
Aug.	1.	Artman, Treichler & Co.	588½	1 00	588 50
	1.	"	467	1 00	467 50
	5.	"	118½	1 00	118 50
	7.	John Turnball, Jr., & Co.	118½	1 02½	121 45
	"	Geo. O. Robinson	113½	1 05	119 18
	10.	Artman, Treichler & Co.	116½	1 00	116 50
	"	Heynemann & Co.	247½	1 03	254 92
	12.	Adams, Mansur & Co.	116	1 02½	118 90
	14.	H. Placet	120	1 02½	123 00
	15.	John L. Bert	117½	1 00	117 50
	"	S. Freedman & Bros.	118	1 02½	120 95
	17.	Marrett, Bailey & Co.	250½	1 00	250 50
	18.	Artman, Treichler & Co.	111½	1 00	111 50
	19.	P. Pratt	123	1 05	129 15
	21.	H. B. Claflin & Co.	470½	1 00	470 50
	21.	Bullene, Moore & Emerys	226½	1 00	226 50
	22.	Artman, Treichler & Co.	233	1 00	233 00
	26.	"	221	1 00	221 00
	"	H. B. Weber & Co.	229½	1 02½	235 24
	27.	Field, Leiter & Co.	117	1 00	117 00
Sept.	1.	Harris, Chipman & Co.	113	1 00	113 00
	"	Field, Leiter & Co.	118	1 00	118 00
	"	R. H. Carmichael	111	1 05	116 55
	4.	Artman, Treichler & Co.	118½	1 00	118 50
104					
	4.	Field, Leiter & Co.	112½	1 00	112 50
	5.	Harris, Chipman & Co.	123½	1 00	123 50
	7.	F. Immen	116½	1 01	117 66
	8.	Artman, Treichler & Co.	120	1 00	120 00
	10.	Field, Leiter & Co.	112	1 00	112 00
	12.	Harris, Chipman & Co.	122½	1 00	122 50
	"	Field, Leiter & Co.	122½	1 00	122 50
	14.	Artman, Treichler & Co.	117	1 00	117 00
	17.	J. F. & E. B. Orne	110	1 00	110 00
	18.	J. Baron & Son	120	1 01	121 21
	19.	Marrett, Bailey & Co.	135	1 00	135 00
	22.	Artman, Treichler & Co.	108	1 00	108 00
	25.	Field, Leiter & Co.	109½	1 00	109 50
	"	Artman, Treichler & Co.	103	1 00	103 00
	28.	Bullene, Moore & Emery	103	1 00	103 00
	"	H. Plant	113	1 02½	115 83
Oct.	1.	Bullene, Moore & Emery	101½	1 00	101 25
	3.	Field, Leiter & Co.	115½	1 00	115 50
	7.	"	120	1 00	120 00
	8.	"	111½	1 00	111 50

		Names of purchasers.	No. of yds.	Price per yd.	Total.
1874.					
Oct.	8.	Artman, Treichler & Co.	119	1 00	119 00
	9.	Harris, Chipman & Co.	239½	1 00	239 50
	13.	George O. Robinson	117½	1 05	123 38
	16.	Harris, Chipman & Co.	120	1 00	120 00
	27.	Geo. O. Robinson	107	1 00	107 00
Nov.	2.	Reeve L. Knight	116½	1 00	116 50
	5.	George O. Robinson	106	1 00	106 00
	13.	Harris, Chipman & Co.	110½	1 00	110 50
	19.	"	115½	1 00	115 50
Dec.	19.	Hitchins Bros. & Schaffer	95	1 00	95 00
	26.	J. Reigel & Co.	109	92½	100 82
1875.					
Jan'y	1.	G. Abbott & Co.	440	90	396 00
	1.	Artman, Dillinger & Co.	349	90	314 10
105					
	1.	Hood, Bonbright & Co.	235½	90	211 95
	"	Ivins, Deitz & Magee	117½	90	105 75
	"	J. F. & E. B. Orne	106	90	95 40
	"	H. B. Claflin & Co.	2773	90	2,495 70
	2.	Hood, Bonbright & Co.	234½	90	211 05
	"	Ivins, Deitz & Magee	340½	90	306 45
	"	H. B. Claflin & Co.	119	90	107 10
	6.	"	106	90	95 40
	7.	"	112	90	100 80
	9.	Field, Leiter & Co.	440	90	396 00
	13.	"	227½	90	204 75
	"	H. B. Claflin & Co.	100½	90	90 45
	"	Field, Leiter & Co.	107½	90	96 75
	15.	H. B. Claflin & Co.	122½	90	110 25
	"	Field, Leiter & Co.	104	90	94 50
	"	H. B. Claflin & Co.	110	90	99 00
	15.	Ivins, Deitz & Magee	242½	90	218 25
	16.	H. B. Claflin & Co.	117½	90	105 75
	"	"	109½	90	98 55
	18.	"	120	90	108 00
	19.	John L. Bert	100	92½	92 50
	"	H. B. Claflin & Co.	118½	90	106 65
	20.	"	117½	90	105 75
	21.	"	120½	90	108 45
	23.	"	117	90	105 30
	23.	Field, Leiter & Co.	121½	90	109 35
	"	H. B. Claflin & Co.	117½	90	105 75
	25.	"	236	90	212 40
	26.	Field, Leiter & Co.	114	90	102 60
	"	H. B. Claflin & Co.	233½	90	210 15
	"	Field, Leiter & Co.	128½	90	115 65
Feb'y	4.	Walter Bros	352½	90	317 25
	"	Torlicht & Duniker	122½	92½	113 31
	6.	H. B. Claflin & Co.	1675	90	1,507 50

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		Names of purchasers.	No. of yds.	Price per yd.	Total.
1875.					
Feb'y	6.	H. B. Clafin & Co.	118½	90	106 65
	9.	"	349	90	314 10
	10.	"	233½	90	210 15
	"	"	233	90	200 70
	16.	Field, Leiter & Co.	116½	90	104 85
	"	Artman, Treichler & Co.	116	90	104 40
	17.	Almy, Bigelow & Weber	111	92½	102 67
	24.	Artman, Dillinger & Co.	114	90	102 60
	25.	S. N. Naudain	122	92½	112 85
	"	E. Grortzinger	123½	92	114 24
	26.	Artman, Treichler & Co.	113	90	101 70
	"	Adam Meldrum & Co.	122	92½	112 85
	"	Artman, Dillinger & Co.	459½	90	413 55
	"	Travilla Bros.	121	95	114 95
March	1.	Field, Leiter & Co.	116½	90	104 85
	1.	Geo. O. Robinson	112½	92½	104 06
	3.	William Graham	110	90	99 00
	5.	Walker Bros.	110	92½	101 75
	"	J. Baron & Son	110½	92½	102 21
	8.	J. M. Spratt & Co.	112½	97½	109 69
	"	W. H. McKnight	118½	90	106 65
	9.	Potter, Buckber & Co.	107	90	96 30
	"	Artman, Dillinger & Co.	119½	90	107 55
	"	Field, Leiter & Co.	119½	90	107 55
	11.	"	101	90	90 90
	"	McFarland, Collins & Co.	122	90	109 80
	"	D. C. Winebrenner	114½	92½	105 91
	12.	J. Crouse & Co.	220	90	198 00
	"	David Shaw	217½	90	195 75
	13.	Artman, Dillinger & Co.	236½	90	212 85
	15.	Field, Leiter & Co.	234½	90	211 05
	19.	Marshall Bros.	233½	90	210 15
	20.	Wood, Worrell & Co.	103½	92½	95 73
	20.	John Mathias	116½	92½	107 76

107

	20.	Field, Leiter & Co.	358½	90	322 65
	24.	C. C. Grosscup	115½	95	109 73
	30.	C. L. McLain & Bro	113	92½	104 52
April	2.	Field, Leiter & Co.	116½	90	104 85
	3.	"	1130½	90	1,019 45
	"	"	117½	90	105 75
	6.	John Gray & Co.	109	90	98 10
	6.	W. C. Brown	228½	90	205 65
	13.	Fahnestock Bros.	114	92	105 45
	17.	Field, Leiter & Co.	221½	90	199 35
	19.	"	553	90	497 70
	27.	"	232½	90	209 25
	28.	"	108	90	97 20

		Names of purchasers.	No. of yds.	Price per yd.	Total.
1875.					
May	1.	Field, Leiter & Co.	1191	90	1,044 90
	3.	"	550½	85	467 93
	7.	"	113	90	101 70
	"	Artman, Treichler & Co	112	90	100 80
	"	Ivins, Dietz & Magee	107	90	96 30
	10.	Field, Leiter & Co.	110½	90	99 45
	12.	"	119½	90	107 55
	13.	"	109½	90	98 55
	"	William Davenport	121	95	114 95
	"	Artman, Dillinger & Co.	116½	90	104 85
	14.	Field, Leiter & Co.	104½	90	94 05
	18.	Jacob Reigel & Co.	119	90	107 10
	"	Field, Leiter & Co.	106½	90	95 85
	19.	"	106½	90	95 85
	20.	David Shaw	111	90	99 90
	22.	Field, Leiter & Co.	125½	90	112 95
	24.	Ivins, Dietz & Magee	105	90	94 50
	"	Field, Leiter & Co.	230½	90	207 45
	25.	Adams, Mansur & Co.	107	92½	98 97
	26.	Field, Leiter & Co.	116½	90	104 85
	28.	"	117	90	105 30
108					
	29.	Field, Leiter & Co.	110½	90	99 45
June	1.	"	117	90	105 30
	4.	Artman, Dillinger & Co	119½	90	107 55
	16.	Harbour & Dittman	118½	90	106 65
July	1.	Harris, Chipman & Co.	234½	92	216 91
	1.	Field, Leiter & Co.	590	92½	545 75
	1.	Harris, Chipman & Co.	461½	92	426 89
	1.	"	107½	92½	99 43
	1.	H. B. Claflin & Co.	103½	90	93 15
	1.	Field, Leiter & Co.	103½	92½	95 73
	1.	Harris, Chipman & Co.	230½	92½	213 21
	9.	H. B. Claflin & Co.	228½	90	205 65
	"	Marrett, Bailey & Co.	110	95	104 50
	10.	John Shillito & Co.	898	92½	830 65
	"	Harris, Chipman & Co.	104½	92½	96 66
	13.	John Shillito & Co.	108	92½	99 90
	14.	H. B. Claflin & Co.	110	90	99 00
	16.	John Shillito & Co.	124½	92½	115 16
	21.	H. B. Claflin & Co.	113	90	101 70
	26.	"	106	90	95 40
	29.	Marrett, Bailey & Co.	118½	95	112 58
Aug.	3.	"	121	95	114 95
	11.	George O. Robinson	120	95	114 00
	13.	H. B. Claflin & Co.	119	90	107 10
	17.	"	110	90	99 00
	21.	"	111	90	99 90
	"	F. Deutchman	112	97½	109 20

		Names of purchasers.	No. of yds.	Price per yd.	Total.
1875.					
Aug.	23.	Artman, Treichler & Co.	114½	95	107 78
	24.	P. P. Kensey	105½	1 00	105 50
	25.	F. Immens	93½	90	84 15
	"	"	222	93	206 92
	28.	Luther Johnson	120½	95	114 48
109					
	28.	Johnson & Co.	107½	95	102 13
	31.	H. B. Claflin & Co.	118½	90	106 65
Sept.	1.	W. E. French & Co.	124½	95	118 28
	2.	John H. White	107½	97½	104 81
	3.	H. Wetheimer	117½	1 00	117 50
	4.	Samuel B. Boyd	112	95	106 40
	6.	Kershbaum, Winters & Co.	115½	95	109 73
	"	Aaron Rheinskein	112½	95	106 87
	10.	Ivins, Deitz & Magee	117	92½	118 22
	14.	John Shillito	113	92½	104 52
	"	G. V. S. Quackenbush & Co.	113½	92	104 98
	"	Osborn, Kershaw & Co.	107	93	99 51
	16.	Geo. O. Robinson	114½	94	107 63
Oct.	6.	"	129½	94	122 73
	21.	"	119½	94	112 33
	"	James H. Orne, Son & Co.	106	90	95 40
	23.	Geo. O. Robinson	120½	90	108 45
Nov.	22.	Fell & Vanness	120½	90	114 00
Dec.	1.	Geo. O. Robinson	207½	90	186 75
Sept.	10.	A. B. Beach & Co.	114	92½	105 45
	1876.				
Feb.	1.	James Freht	114	90	102 60
	10.	Granville Worrell	119½	90	107 55
Mar.	1.	Fitzwilliams & Sons	111½	85	94 77
	1.	Hilt, White & Mitchell	141½	85	103 27
	4.	Cochran, McLean & Co.	113	85	96 05
	7.	Geo. O. Robinson	123½	85	104 98
	15.	William Graham	110½	85	93 93
	16.	Woodward, Barber & Co.	115½	90	103 95
	18.	J. Hofstadt & Sons	119	90	107 10
	20.	Cochran, McLean & Co.	114⅓	85	40 08
110	24.	Jackson & Hughes	128	85	108 80
Ap'l	15.	R. Burger & Co.	112½	85	95 63
Sep.	29.	Geo. O. Robinson	116½	80	93 20
				Gross	$48,952 34
		Goods sold on 90 days or 4 months, trade discount 3 per cent.		$1,468 56	
		Commission for selling and guarantee 5 per cent.		2,447 60	
					3,916 16
				Net sales	$45,036 18

111 EXHIBIT B.

Prices of yarn sold on the following dates:

Jan'y.		July.
	1868.	
Double reel -- 50, 47½, 45		Double reel--- 50, 52½
Worsted -----		Worsted ----- 75
	1869.	
Double reel -- 53, 56, 57½		Double reel--- 50, 52½, 53½
Worsted ----- 80		Worsted ----- 70, 75
	1870.	
Double reel -- 45, 46, 47½, 50		Double reel--- 37½, 40, 42½, 45
Worsted ----- 65		Worsted ----- 54, 55
	1871.	
Double reel -- 40, 42½		Double reel--- 47½ to 62½
Worsted ----- 55		Worsted ----- 60 to 75
	1872.	
Double reel -- 60, 62½, 65		Double reel--- 56, 58, 60
Worsted ----- 70, 72½		Worsted ----- 82½, 85, 90
	1873.	
Double reel -- 50, 55		Double reel--- 40, 42½, 45
Worsted ----- 80		Worsted ----- 62½, 64
	1874.	
Double reel -- 40, 42½, 45		Double reel--- 44, 46
Worsted ----- 62½		Worsted ----- 61, 62½
	1875.	
Double reel -- 41½, 45		Double reel--- 42½, 45
Worsted ----- 60		Worsted ----- 62½, 65
	1876.	
Double reel -- 42½, 45		Double reel--- 37½, 40
Worsted ----- 70, 72½		Worsted -----

Mess. J. & J. DOBSON.

Above we hand you list of prices of yarns from 1868 to 1876, inclusive, at the request of your Mr. Jas. Dobson.

Yours, truly, McCALLUM, CREASE & SLOAN.

Philad'a, April 14th, 1877.

112 EXHIBIT C.

Cost of Manufacturing Ingrain Carpets for the Month of March, 1877.

Pay-rolls.

Section hands	$572 83
Day hands, (boys and men)	243 36
Finishing and rolling	52 00
Picking, piece and day hands	634 72
Warping	185 30
Weaving	3,016 00
Day hands, winding	284 74
Piece workers, "	725 00
Machinists' time, say	200 00
Pattern designing, say	100 00
Card cutting and facing	50 00
Card paper, say	50 00
	$6,113 95
Production, 48,227 yards, at 12¾ cents	$6,148 93

113 EXHIBIT D.

Pattern No. 408. *Manufactured by Dornan, Maybin & Co.*

U. S. Patent No. 6822, Aug. 19, 1873.

	Name.	Address.	No. of pieces.		Price.
1873.					
Aug't 4.	C. S. Weatherby & Co.	Cincinnati	1	super	95
7.	John L. Bert	Quincy, Ill.	1	"	95
8.	C. B. Bray & Co.	St. Louis	1	"	95
18.	W. M. Davis	Indianapolis	1	"	95
19.	Field, Leiter & Co.	Chicago	1	"	95
20.	Brokaw Bros.	Terre Haute, Ind.	1	"	95
23.	W. Campbell	Lexington, Ky.	2	"	95
"	Chancellor, Forgy & Co.	Dayton, Ohio	1	"	95
"	Brokaw Bros.	Terre Haute	1	"	95
26.	C. B. Bray & Co.	St. Louis	1	"	95
"	Adams, Mansur & Co.	Indianapolis	1	"	95
30.	Harbour & Dittman	Wheeling, W. Va.	1	"	95
Sept. 1.	Field, Leiter & Co.	Chicago	1	"	95
1.	J. Kennard & Sons	St. Louis	1	ex. "	1 10
2.	Ithiel Stone	Cleveland	1	super	95
2.	Munger & Co.	Bay City, Mich.	1	"	95
4.	J. G. Fisher & Co.	New York	1	"	95
4.	Harris, Chipman & Co.	Boston	1	ex. "	1 10
5.	Beattys & Boak	New York	1	"	95
12.	Jordan, Marsh & Co.	Boston	1	ex. "	1 10
12.	Field, Leiter & Co.	Chicago	1	super	95
114					
12.	Latimer Bros.	Brooklyn	1	super	95

	Name.	Address.	No. of pieces.		Price.
1873.					
Sept. 13.	R. B. Hinchman & Co.	Worcester, Mass.	1	"	95
17.	Lord & Taylor	New York	1	"	95
17.	Peasley & Bond	Boston	1	"	95
17.	McCain Bros.	Pittsburgh	1	"	95
18.	Horlicht & Dunker	St. Louis	1	ex. "	1 00
20.	Almy & Bigelow	Salem, Mass.	1	super	95
"	Tinkham & Co.	Springfield	1	"	95
23.	J. H. Whyman & Co.	Burlington, Iowa	1	ex. "	1 10
23.	Lord & Taylor	New York	1	super	95
24.	Derendorf & Mann	Cedar Rapids	1	ex. "	1 12½
25.	Field, Leiter & Co	Chicago	1	super	95
27.	Robinson & Trail	Baltimore	1	ex. "	1 10
"	J. Kennard & Sons	St. Louis	1	ex. "	1 00
29.	Wheeler & Marsh	Bridgeport, Ct.	1	super	95
"	A. A. Prince & Co.	Springfield, Mass	1	"	95
30.	Ithiel Stone	Cleveland, O.	1	"	95
Oct'r 2.	F. W. Rosenthal & Co.	St. Louis	1	ex. "	1 10
"	Harris, Chipman & Co.	Boston	1	ex. "	1 10
"	L. Salisburg	Norfolk, Va.	1	super	1 00
3.	Thayer & Sears	Boston	1	"	95
"	Williams & Leidig	Philadelphia	1	"	95
4.	Bailey Bros.	Brooklyn	1	ex. "	1 10
7.	Jordan, Marsh & Co.	Boston	1	ex. "	1 10
9.	Hammond & Hyer	Concord, N. H.	1	super	95
10.	Harris, Chipman & Co.	Boston	1	ex. "	1 10
"	J. Kennard & Sons	St. Louis	1	ex. "	1 10
"	Field, Leiter & Co.	Chicago	1	super	95
"	Bond, Black & Co.	Detroit	1	"	95
14.	Jordan, Marsh & Co.	Boston	1	ex. "	1 10
15	Bailey Bros.	Brooklyn	1	ex. "	1 00
17.	Field, Leiter & Co.	Chicago	1	super	95
20.	Jordan, Marsh & Co.	Boston	1	ex. "	1 10
21.	John H. Pray, Sons & Co.	Boston	1	ex. "	1 10
115					
21.	J. B. Judkins	Boston	1	super	95
22.	Field, Leiter & Co.	Chicago	1	"	95
27.	"	"	1	"	95
30.	J. B. Judkins	Boston	1	"	95
31.	Merrick & McClure	Xenia, O.	1	"	95
Nov. 10.	S. C. Foulk	Philadelphia	1	"	95
12.	J. B. Judkins	Boston	1	"	95
28.	John L. Cobbs	Montgom'y, Ala.	1	"	95
Dec. 23.	Harris, Chipman & Co.	Boston	1	ex. "	1 10
1874.					
Jan. 20.	Harris, Chipman & Co.	Boston	2	ex. "	1 10
21.	Field, Leiter & Co.	Chicago	4	ex. "	1 10
30.	Harris, Chipman & Co.	Boston	1	ex. "	1 10
"	Field, Leiter & Co.	Chicago	2	ex. "	1 10
Feb'y 6.	John Spratt	Philadelphia	1	ex. "	1 10

	Name.	Address.	No. of pieces.	Price.
1874.				
Feb'y 7.	Adams, Mansur & Co.	Indianapolis	2 ex.	1 10
"	Goldsmith & Co.	Milwaukee	1 ex.	1 10
"	Harris, Chipman & Co.	Boston	1 ex.	1 10
"	Field, Leiter & Co.	Chicago	3 ex.	1 10
"	J. B. Judkins	Boston	1 ex.	1 12½
17.	E. P. Ward	Newark, N. J.	1 super	95
"	Field, Leiter & Co.	Chicago	2 ex.	1 10
"	P. W. Smith & Son	Newark, N. J.	1 ex.	1 10
"	Chancelor, Forgy & Co.	Dayton, O.	1 ex.	1 12½
18.	S. Freedman & Co.	Detroit, Mich.	1 ex.	1 10
19.	Sheehy Bros.	New York	1 ex.	1 10
19.	W. S. Leigh	New York	1 super	95
19.	Goldsmith & Co.	Milwaukee	1 ex.	1 10
23.	A. W. Skilton & Co.	Philadelphia	2 ex.	1 10
25.	A. Sauter	Geen Point, N. Y.	1 ex.	1 12½
25.	W. M. Kennard & Co.	Wilmington, Del.	1 ex.	1 10
"	Latimer Bros.	Brooklyn	1 ex.	1 10
"	S. A. Spencer	New York	2 ex.	1 10
"	Lord & Taylor	"	1 ex.	1 10
116				
25.	C. B. Bray & Co.	St. Louis	1 ex.	1 10
"	Chamberlain, Boynton, & Co.	Savannah, Ga	1 ex.	1 10
27.	Almy & Bigelow	Salem, Mass.	1 super	95
"	W. L. Anderson	St. Paul, Minn.	1 ex.	1 10
28.	Spring & Avery	Grand Rapids, M.	1 super	95
"	D. W. Mead	Mt. Vernon, O.	1 "	97½
"	F. K. Shawhan & Co.	Tiffin, O.	1 "	95
"	C. Wilson	New York	1 ex.	1 10
Mar. 2.	Thos. Depuy	Philadelphia	1 ex.	1 10
3.	W. & F. C. Trauernicht	St. Louis	1 ex.	1 10
"	D. W. Haight	Brooklyn	1 ex.	1 10
4.	J. B. Judkins	Boston	1 ex.	1 12½
5.	Jos. Wild & Co.	New York	1 ex.	1 10
11.	Metcalf & Fell	Jacksonville, Ill.	1 super	95
"	J. W. Walker	Covington, Ky.	1 "	95
"	E. D. Keplinger	Canton, O.	1 "	95
12.	Spring & Avery	Grand Rapids, M.	1 ex.	1 10
13.	J. H. Beachley	Hagerstown, Md.	1 super	95
"	S. Freedman & Co.	Detroit, Mich.	1 "	95
17.	C. O. Phelps & Co.	Keokuk, Iowa	1 ex.	1 10
19.	Thos. Depuy	Philadelphia	1 ex.	1 10
"	John Spratt	Philadelphia	1 ex.	1 10
21.	Sheehy Bros.	New York	1 ex.	1 10
23.	H. S. Barney & Co.	Schenectady, N. Y.	1 super	95
24.	Chancelor, Forgy & Co.	Dayton, O.	1 "	95
25.	L. H. Coleman	Springfield, Ill.	1 "	95
"	J. W. Parker	Jersey City, N. J.	1 ex.	1 10

		Name.	Address.	No. of pieces.		Price.
1874.						
Mar.	26.	L. K. Lautermilch	Tiffin, O.	1	ex. sup	1 10
	27.	Harris, Chipman & Co.	Boston	1	ex. "	1 10
	27.	J. Raeder & Bro.	Easton, Pa.	1	super	95
April	2.	M. Krannath	Albany, N. Y.	1	ex. "	1 10
	3.	Beattys & Boak	New York	1	super	95
	3.	F. Sauter	Green Point, N. Y.	1	ex. "	1 10
	4.	J. G. Fisher & Co.	New York	1	super	95
117						
April	6.	J. Henry Anderson	New York	1	super	95
	6.	Jos. Wild & Co.	New York	3	ex. "	1 10
	8.	Lord & Taylor	New York	1	ex. "	1 10
	9.	M. Krannath	Albany, N. Y.	1	ex. "	1 10
	9.	J. W. Parker	Jersey City	1	super	95
	13.	T. F. Mitchell	Middletown, Ct.	1	ex. "	1 10
	13.	J. H. Ryan	Troy, N. Y.	1	ex. "	1 10
	15.	Andrew Bailey	Brooklyn, N. Y.	1	super	95
	16.	W. E. Hart & Son	Elmira, N. Y.	1	"	95
	17.	Harris, Chipman & Co.	Boston	1	ex. "	1 10
	18.	J. S. Campbell	Schenectady, N.Y.	1	"	95
	18.	John Spratt	Philadelphia	1	ex. "	1 10
	21.	J. B. Judkins	Boston	1	super	95
	22.	Prince & Walker	Pittsfield, Mass.	1	ex. "	1 10
	23.	Adams & Meldrum	Buffalo	1	ex. "	1 10
	24.	T. F. Mitchell	Middletown, Ct.	1	super	95
	24.	J. W. Parker	Jersey City, N. J.	1	"	95
	27.	Harris, Chipham & Co.	Boston	1	ex. "	1 10
	28.	Warner Bros.	Erie, Pa.	1	ex. "	1 10
	29.	J. B. Judkins	Boston	1	super	95
	30.	H. & H. N. Arnold	Greenville, O.	1	"	95
	30.	J. W. Parker	Jersey City, N. J.	1	"	95
	30.	J. B. Judkins	Boston	1	"	95
May	2.	J. B. Judkins	Boston	1	ex. "	1 10
	2.	D. W. Smith & Son	Newark, N. J.	1	ex. "	1 10
	2.	W. F. Baker & Co.	Philadelphia	1	ex. "	1 10
	5.	L. K. Lautermilch	Tiffin, O.	1	super	95
	6.	A. W. Skilton & Co.	Philadelphia	1	ex. "	1 10
	8.	Lord & Taylor	New York	1	ex. "	1 10
	8.	A. B. Van Gaasbeck & Co.	Albany	1	ex. "	1 10
	9.	Boylan & Co.	Newark, N. J.	1	super	95
	12.	L. H. Chester & Co.	Buffalo	1	"	95
	13.	A. Bailey	Brooklyn	1	"	95
	13.	J. Sierer	Chambersburg	1	"	95
118						
	13.	Spring & Avery	Grand Rapids	1	super	95
	13.	Adam & Meldrum	Buffalo	1	ex. "	1 10
	13.	Thayer & Sears	Boston	1	super	95
	14.	Fowle, Torry & Co.	Boston	1	ex. "	1 10

		Name.	Address.	No. of pieces.	Price.
1874.					
May	16.	L. H. Chester & Co.	Buffalo	1 ex. sup.	1 10
	16.	Warner Bros.	Erie, Pa.	1 ex. "	1 10
	19.	Lord & Taylor	New York	1 ex. "	1 10
	21.	Snowden & Otte	Cincinnati	1 ex. "	1 10
	22.	J. H. Judkins	New York	1 super	95
	22.	Wm. Pollock	Philadelphia	1 "	95
	23.	J. H. Ryan	Troy, N. Y.	1 ex. "	1 10
	"	F. Sauter	Green Point	1 ex. "	1 10
	"	Andrew Bailey	Brooklyn	1 super	95
	"	C. S. Weatherby & Co.	Cincinnati	1 "	95
	25.	A. W. Skilton & Co.	Philadelphia	1 "	95
	26.	Ryce's Carpet Hall	Terre Haute	1 "	95
	27.	Van Ausdal & Harman	Dayton	1 ex. "	1 10
	"	A. Gall	Indianapolis	1 ex. "	1 10
	28.	Adams, Mansur & Co.	"	1 ex. "	1 10
	30.	Fenn & Carter	Pittsfield, Mass.	1 ex. "	1 10
June	2.	Adam & Meldrum	Buffalo	1 ex. "	1 10
	3.	J. Krause & Co.	Cleveland	1 ex. "	1 10
	"	W. S. Leigh	New York	1 super	95
	"	A. W. Skilton & Co.	Philadelphia	1 ex. "	1 10
	4.	J. Sierer	Chambersburg	1 super	95
	"	Adam & Meldrum	Buffalo	1 ex. "	1 10
	"	Oliver Baker	Cleveland	1 super	95
	5.	P. McHugh	New York	1 "	95
	"	S. Freedman & Co.	Detroit	1 "	95
	"	C. S. Weatherby & Co.	Cincinnati	1 "	95
	6.	O. Baker	Cleveland	1 ex. "	1 10
	8.	H. B. Webber & Co.	St. Louis	1 ex. "	1 10
	"	A. Gall	Indianapolis	1 ex. "	1 10
	9.	F. Eaton & Co.	Toledo	1 ex. "	1 10
119					
	11.	Chancelor, Forgy & Co.	Dayton, O.	1 ex. "	1 10
	12.	Geo. E Gordon & Co.	Indianapolis	1 ex. "	1 10
	13.	F. Eaton & Co.	Toledo, O.	1 ex. "	1 10
	"	John Spratt	Philadelphia	1 ex. "	1 10
	15.	A. W. Skilton & Co.	Philadelphia	1 ex. "	1 10
	18.	Peasley & Bond	Boston	1 ex. "	1 10
	"	P. W. Smith & Son	Newark, N. J.	1 ex. "	1 10
	"	F. Sauter	Green Point	1 ex. "	1 10
	"	Lord & Taylor	New York	1 ex. "	1 10
	23.	"	New York	1 ex. "	1 10
	24.	Adams, Mansur & Co.	Indianapolis	1 ex. "	1 10
	25.	A. W. Skilton & Co.	Philadelphia	1 ex. "	1 10
	27.	Barnes, Bancroft & Co.	Buffalo	1 ex. "	1 10
	29.	Thayer & Sears	Boston	1 super	95
	30.	W. S. Leigh	New York	1 "	95
July	2.	Jos. Wild & Co.	New York	1 ex. "	1 10
	9.	A. Gall	Indianapolis	2 ex. "	1 10
	13.	Adams, Mansur & Co.	Indianapolis	1 ex. "	1 10

		Name.	Address.	No. of pieces.	Price.
1874.					
July	31.	J. B. Judkins	Boston	1 super	95
	31.	" "	"	1 ex. "	1 10
	31.	J. Krauss & Co.	Cleveland	1 ex. "	1 10
	31.	Beckwith, Sterling & Co.	"	1 ex. "	1 10
Aug.	1.	H. B. Webber & Co.	St. Louis	1 ex. "	1 10
	5.	Metcalf & Fell	Jacksonville, Ill.	2 ex. "	1 10
	5.	Thayer & Sears	Boston	2 ex. "	1 10
	5.	" "	"	1 super	95
	5.	Fowle, Torry & Co.	"	2 ex. "	1 10
	5.	C. S. Weatherby & Co.	Cincinnati	1 super	95
	5.	Fitzwilliam & Sons	Bloomington, Ill.	1 ex. "	1 10
	6.	Henry Cram	Providence, R. I.	1 super	95
	7.	S. C. Foulk	Philadelphia	1 "	95
	8.	Judson & McCulloch	Boston	1 ex. "	1 10
	"	Henry Cram	Providence	1 super	95
	10.	Fitzwilliam & Son	Bloomington	1 "	95
120					
	10.	L. H. Chester & Co.	Buffalo	1 ex. sup.	1 10
	12.	Adams, Mansur & Co.	Indianapolis	1 super	95
	17.	Waring Bros.	Fall River, Mass.	1 ex. "	1 10
	"	S. Freedman & Co.	Detroit	1 super	95
	18.	Spring & Avery	Grand Rapids	1 "	95
	20.	J. H. Wyman	Burlington, Iowa	1 ex. "	1 10
	"	Daniel Gould	Davenport, "	1 super	95
	"	Wadsworth & Parsons	Rock Island	1 "	95
	21.	F. Eaton & Co.	Toledo, O.	1 ex. "	1 10
	"	A. Gall	Indianapolis	1 super	95
	22.	Beckwith, Sterling & Co.	Cleveland	1 ex. "	1 10
	"	T. B. Carlin	Frederick, Md.	1 ex. "	1 12½
	"	Geo. Willner	Washington, D.C.	1 ex. "	1 10
	"	Allen Mackey & Co.	Chicago	2 ex. "	1 10
	25.	E. Whipple	Philadelphia	1 super	95
	26.	A. & C. A. McCall	Newark, N. J.	1 "	95
	"	Lowe, Anthony & Crowell	Providence, R. I.	1 "	95
	"	Goldsmith & Co.	Milwaukee, Wis.	1 "	95
	28.	Thos. Depuy	Philadelphia	1 ex. "	1 10
	31.	Beckwith, Sterling & Co.	Cleveland, O.	1 ex. "	1 10
Sep.	3.	Dubois & Atkins	Philadelphia	1 super	95
	3.	Allen, Mackey & Co.	Chicago	1 ex. "	1 10
	"	" "	"	1 super	95
	7.	Stark Bros.	Milwaukee	1 ex. "	1 10
	11.	A. B. VanGaasbeck & Co.	Albany	1 ex. "	1 10
	"	J. B. Judkins	Boston	1 ex. "	1 10
	"	" "	"	1 super	95
	12.	Allen, Mackey & Co.	Chicago	2 "	95
	14.	W. & F. C. Trauernicht	St. Louis	1 ex. "	1 10
	"	Beckwith, Sterling & Co.	Cleveland	1 ex. "	1 10
	"	A. W. Skilton & Co.	Philadelphia	1 ex. "	1 10
	16.	D. F. Haight	Brooklyn	1 ex. "	1 10

		Name.	Address.	No. of pieces.	Price.
1874.					
Sep.	17.	Allen, Mackey & Co.	Chicago	1 ex. sup.	1 10
	19.	J. Krauss & Co.	Cleveland	1 ex. "	1 10
121					
	19.	A. W. Skilton & Co	Philadelphia	1 ex. sup.	1 10
	21.	A. Gall	Indianapolis	1 super	95
	25.	Allen, Mackey & Co	Chicago	1 ex. "	1 10
	28.	" " "	"	1 super	95
	30.	S. C. Foulk	Philadelphia	1 "	95
	"	Allen, Mackey & Co	Chicago	1 ex. "	1 10
	"	Peasley & Bond	Boston	1 super	95
Oct.	1.	J. B. Judkins	"	1 "	95
	5.	W. T. Kilburn & Co	Portland, Maine	1 ex. "	1 10
	8.	A. Van Gaasbeck & Co	Albany	1 ex. "	1 10
	"	L. L. Blake & Co	Lewiston, Me	1 super	95
	9.	Allen & Maxwell	" "	1 "	95
	"	J. B. Judkins	Boston	1 "	95
	"	" "	"	1 ex. "	1 10
	14.	Cole & Nutting	Troy, N. Y	1 ex. "	1 10
	19.	Barclay & Black	Detroit	1 super	95
	20.	J. Krauss & Co	Cleveland	2 ex. "	1 10
	"	C.W. & E. Partridge & Co	Chicago	1 ex. "	1 10
	23.	H. Westhus	St. Louis	1 ex. "	1 10
Nov'r	6.	Jos. Wild & Co	New York	1 ex. "	1 10
	13.	J. B. Judkins	Boston	1 super	95
	17.	" "	"	1 ex. "	1 10
1875.					
Feb.	1.	Beckwith, Sterling & Co	Cleveland	1 ex. "	1 00
	13.	Jos. Wild & Co	New York	1 ex. "	1 00
	15.	King & Blakeman	Troy, N. Y	1 ex. "	1 00
	22.	W. P. Clark	Mansfield, O	1 ex. "	1 00
	25.	J. Goldthwaite & Co	Boston	3 ex. "	1 00
	25.	Lord & Taylor	New York	1 ex. "	1 00
	26.	Jos. Wild & Co	New York	1 ex. "	1 00
	27.	Hilt, White & Mitchell	Urbana, O	1 super	85
Mar.	5.	J. B. Judkins	Boston	1 super	85
	5.	Allen, Mackey & Co	Chicago	2 super	82½
	5.	Beckwith, Sterling & Co	Cleveland	1 ex. "	1 00
122					
May	10.	R. H. Van Horn	Lambertville, N.J.	1 super	95
	"	A. W. Skilton & Co.	Philadelphia	1 "	85
	"	"	Philadelphia	1 ex. "	1 00
	11.	Goldsmith & Co.	Milwaukee	1 super	85
	12.	Henry Grebe	Wilmington, Del.	1 "	85
	13.	Cole & Nutting	Troy, N. Y.	1 ex. "	1 00
	13.	Ellsworth, Andrews & Co.	Ft. Wayne	1 ex. "	95
	15.	Lord & Taylor	New York	1 ex. "	1 00
	"	" "	"	1 super	85
	"	S. C. Foulk	Philadelphia	1 "	85

		Name.	Address.	No. of pieces.		Price.
1875.						
May	15	Hemphill, Hamlin & Co.	New York	5	ex. sup.	1 00
	23.	B. P. Cunningham	Boston, Mass.	1	super	85
	25.	Jacob Crouse	Philadelphia	1	"	85
	27.	J. Sierer	Chambersburg	1	"	85
	"	Lowe, Anthony & Crowell	Providence, R. I.	1	"	85
	29.	John Spratt	Philadelphia	1	"	85
	30.	Harris, Chipman & Co.	Boston	1	"	85
	31.	R. H. Van Horn	Lambertville	1	"	85
	"	Leamard, Harbley & Co.	Boston	1	"	85
April	1.	J. S. Bissel & Bro.	Wooster, O.	2	"	87½
	6.	Adam & Meldrum	Buffalo	1	"	85
	21.	Goldsmith & Co.	Milwaukee	1	"	85
	30.	" "	"	1	"	85
	"	Lord & Taylor	New York	1	ex. "	1 00
May	4.	King & Blakeman	Troy, N. Y.	1	ex. "	1 00
	10.	Hemphill & Hamlin	New York	1	super	85
	14.	Harris, Chipman & Co.	Boston	1	"	85
	19.	Jos. Wild & Co.	New York	1	ex. "	95
	21.	S. C. Foulk	Philadelphia	1	super	87½
	24.	Hemphill & Hamlin	New York	1	"	85
	"	Beckwith, Sterling & Co.	Cleveland	1	ex. "	1 00
	31.	King & Blakeman	Troy, N. Y.	1	ex. "	1 00
	"	Lord & Taylor	New York	1	ex. "	1 00
	"	Hemphill, Hamlin & Co.	"	1	super	85
123						
June	4.	J. Goldthwaite & Co	Boston	1	ex. sup.	1 00
	8.	Geo. Wilson	Brooklyn	1	ex. "	1 00
	"	Hemphill & Hamlin	New York	1	super	85
	10.	"	"	1	"	85
	11.	"	"	1	"	85
	12.	J. Goldthwaite & Co	Boston	1	ex. "	1 00
	"	Beckwith, Sterling & Co	Cleveland	1	ex. "	1 00
	14.	Stark Bros	Milwaukee	1	ex. "	1 00
	17.	Hemphill & Hamlin	New York	1	super	85
	18.	Beckwith, Sterling & Co	Cleveland	1	ex. "	1 00
	"	J. B. Judkins	Boston	1	super	87½
	25.	J. Goldthwaite & Co	"	1	ex. "	1 00
	"	Beckwith, Sterling & Co	Cleveland	1	ex. "	1 00
July	12.	Lord & Taylor	New York	1	ex. "	1 05
	31.	King & Stover	"	1	super	90
Aug.	9.	A. B. Van Gaasbeck & Co	Albany	1	"	87½
	11.	John Spratt	Philadelphia	1	"	90
	13.	Allen, Mackey & Co	Chicago	1	"	87½
	17.	Stark Bros	Milwaukee	2	ex. "	1 00
	"	Harris, Chipman & Co	Roston	2	super	87½
	19.	G. W. Anderson & Son	Richmond, Va	1	ex. "	1 00
	20.	Beckwith, Sterling & Co	Cleveland	1	ex. "	1 00
	"	Torry, Bright & Capen	Boston	1	super	90

		Name.	Address.	No. of pieces.	Price.
1875.					
Aug.	27.	Allen, Mackey & Co	Chicago	1 ex. sup	1 00
	"	G. S. Bowen	Baltimore	1 super	90
	28.	J. B. Judkins	Boston	1 "	87½
	"	Adams, Mildrum & Anderson.	Buffalo	1 ex. "	1 00
Sept.	1.	Abernathy Bros	Leavenworth, K's	1 ex. "	1 00
	10.	Harris, Chipman & Co	Boston	1 super	87½
	15.	Lord & Taylor	New York	1 ex. "	1 00
	21.	"	"	1 ex. "	1 00
	22.	J. Stillito & Co	Cincinnati	1 super	87½
	24.	Abernathy, North & Orrison.	Kansas City, Mo.	1 ex. "	1 00
	29.	Beckwith, Sterling & Co	Cleveland, O	1 ex. "	1 00
124					
Oct'r	6.	Goldsmith & Co.	Milwaukee	1 super	87½
	7.	Stark Bros.	"	1 ex. "	1 00
	11.	King & Blakeman	Troy, N. Y.	1 ex. "	1 00
	18.	J. B. Judkins	Boston	1 super	87½
	27.	Abernathy Bros.	Leavenworth, Kas.	1 ex. "	1 00
1876.					
Feb.	11.	E. Whipple	Philadelphia	1 super	87½
	28.	Barnes, Bancroft & Co.	Buffalo	1 ex. "	1 00
Mar.	1.	M. S. Price	Syracuse, N. Y.	1 ex. "	95
	3.	Jordan, Marsh & Co.	Boston	1 super	85
	6.	J. H. Orne, Sons & Co.	Philadelphia	1 "	85
	10.	Winn & Weaver	New York	1 ex. "	97½
	17.	G. S. Bowen	Baltimore	1 super	85
April	3.	Thos. Depuy	Philadelphia	1 "	85
	6.	Creagmile & Co.	"	1 "	85
	22.	E. Banister	"	1 ex. "	95
	27.	S. C. Foulk	"	1 super	85
May	12.	Barnes, Bancroft & Co.	Buffalo	1 ex. "	95
	19.	Sterling & Co.	Cleveland	1 ex. "	95
Aug.	28.	Geo. Willner	Washington, D.C.	1 ex. "	85
Sept.	4.	Lord & Taylor	New York	1 ex. "	85
	21.	M. S. Price	Syracuse	1 super	75
	22.	A. J. Magoon & Co.	Providence, R. I.	1 "	75
1877.					
Jan.	12.	Hemphill, Hamlin & Co.	New York	1 ex. "	85
	17.	" "	"	1 ex. "	85
	19.	" "	"	1 ex. "	85
	30.	Barnes, Bancroft & Co.	Buffalo	1 "	77½
	31.	Chipman, Sons & Co.	Boston	1 "	75
Feb.	17.	W. A. Rolin	Philadelphia	1 "	75
	22.	Stark Bros.	Milwaukee	1 ex. "	85
Mar.	6.	Sterling & Co.	Cleveland	1 ex. "	85
	8.	R. H. Van Horn	Lambertvile	1 super	75
125					
	13.	Sterling & Co.	Cleveland	1 ex. "	85

	Name.	Address.	No. of Pieces.	Price.
1875.				
Mar. 19.	Heinen, Schreyer & Co.	Milton, Pa.	1 super	75
"	Lord & Taylor	New York	1 ex. "	85
April 2.	Judson & Co.	Chicago	1 super	75
18.	W. P. Clark	Mansfield, O.	1 ex. "	85
"	Chipman, Sons & Co.	Boston	1 super	75
28.	Sterling & Co.	Cleveland	1 ex. "	85

126 EXHIBIT E.

1874.

	Cents.
5 oz. Abbot worsted (per yard) @ 4½ cts. per oz.	22½
1 lb. " D. R. (filling) @	50
Cost of manufacture, including wear and tear	15
Cost per yard	87½

1875.

5 oz. Abbot worsted (per yard) @ 4½ cts. per oz.	22½
1 lb. " D. K. (filling) @	47½
Cost of manufacture, including wear and tear	14
Cost per yard	84

127 In the Circuit Court of the United States for the Eastern District of Pennsylvania. In Equity. October Sessions, 1874. No. 2.

DORNAN *et al. vs.* DOBSON *et al.*

WEDNESDAY, *Dec. 26th*, 1877.

Mr. JAMES DOBSON, examined on behalf of defendants by Mr. WHITE:

Pattern and design do not affect the price of carpets of the quality and character involved in this suit. During the years 1874 and 1875 we used, probably, more than 120 designs in the manufacture of ingrain carpet. We made no difference in the price of any of the carpets on the ground of design; we sold them, so far as the design was concerned, at the same price.

Q. What is the highest price you have ever known paid for a design for ingrain carpets?

A. Ten dollars is the highest we have ever paid; they are
128 sold by the card, two or three cents per card or line; and a short pattern, such as this, would not cost over ten dollars. I never knew more than ten dollars to be paid for a pattern. A fancy pattern, such as this, generally runs for one season; occasionally, but rarely, they run two seasons. The "Henry Clay" and the "Eagle Head," which Mr. Dornan testified had run for years, can be explained as follows:

They are patterns of two or three colors only, and, in common with other patterns of only two or three colors, are always fashionable, such as two greens, two drabs, etc.; they are what we call "staple goods." This pattern is not of that character. The conformation of the design would prevent its being made of two or three colors to render it desirable. It is what we term "a fancy pattern." I do not think, in point of fact, that we obtained a customer or sold a yard of carpet more in consequence of using this pattern. I have already stated that we did not get a cent more for the goods by reason of the pattern. The loss of a single pattern from our stock would not affect our sales in a year. It is not so much the pattern as the coloring of the pattern which renders it salable. A good design poorly colored would be undesirable. We could have used the same colors in other patterns if deprived of this one. We had patterns in which we put the same colors at the same time, and sold more of them.

Cross-examined by Mr. CLEEMANN:

Though we had 120 patterns during 1874 and 1875, we sold more of one design than of others. Without reference to our books I cannot tell of what pattern we sold the least. I can give the patterns, by their numbers, of which we sold more than of the one in question. Some of them are Nos. 125, 126, 161, 198, and 304, the last three of which we are now using, and have not been out of loom since they were first put in.

129 No. 304 was put in loom in 1875; Nos. 125, 126, 161, and 198 were put in loom in 1873. There are others, whose numbers I cannot now recall. I was not mistaken in stating that a fancy pattern does not generally run over two seasons. Nos. 161 and 198 we were making at the same time with the carpet in question, and are making them still. Nos. 125 and 126 we did not run after the second season, for the reason that they were fancy patterns. Those that we continued to sell were not fancy patterns, we merely put the same colors into them, they were three-color patterns. We sold more of the "fancy patterns," Nos. 125 and 126, than of the carpet in question; I cannot tell how much more we sold of No. 125 than of the carpet in question without reference to our books, further than the numbers of looms that we were working on them at the time. On No. 125 or 126 we had twenty or twenty-two looms working at one time, while on the carpet in question we had only from five to ten looms at one time. We had the designs, Nos. 125 and 126, prior to the carpet in question; they were copied from two Brussels carpets we were then making. I do not know that we had any other fancy patterns, except those I have named, of which we sold more than of the pattern in question; I cannot state, however, without reference to the books; I cannot carry the patterns in my head from year to year. We might have had a dozen fancy patterns, but of the particular grade of pattern in question I do not think we had more than four during the time referred to. Some patterns, if well colored, will sell more readily than others. In my estimation, configuration is nothing in a pattern unless well colored. We have

some patented designs ourselves we used to have. Nos. 125 and 126 and 161 and 198 were patented; we have not patented patterns since the last two years and a half; we gave it up as a useless ex-
130 pense; the patterns were patented I believe for three years and a half; the cost of obtaining a patent is about $20. I bought two patterns from a Mr. Swann, a designer; one for $2.50 and the other for $7.50, and the first named is the best design we have now, I think, in our establishment; the more expensive had more drawing on it, was a larger design.

I bought five designs last fall from a Swiss, and recently I bought five more from him. They averaged in cost $7.50; the designs are about equal in size to the one in question; we have only had about two unsuccessful patterns that we have purchased. The patterns when offered for sale are not colored.

Q. Then, if the excellence of a design consists in its coloring, and these designs are not colored when you buy them, how do you judge whether a design is a good one or not?

A. A person used to seeing drawings daily, as I am, or other manufacturers, can generally pick out a good design out of thirty or forty, when they are offered to him; designs should be drawn so that the parting of the colors will be distinct; that leaves the pattern free and open, and it becomes a question for the purchaser what colors shall go in; I stated before, that there are always standard colors which are desirable, while fancy colors and shades are not so desirable only for a season; taking all these things into consideration, you are very apt to pick out a good design.

Q. State what you mean by a good design and a bad design?

A. A good design is one which shows the figures distinct and properly proportioned; a poor design is otherwise.

Q. Why do you prefer a good to a bad design.

131 A. For the same reason that I prefer a good horse. If you get a good design and good colors, you get a good and salable carpet.

Q. Does a bad design make a carpet less salable?

A. Certainly.

Q. You buy the designs from the designers before they have been made into carpet; do you not?

A. Yes, sir.

Q. When you say that the "Henry Clay" and "Eagle Head" are patterns of two or three colors only, you do not mean to say that all patterns which have only two or three colors in them are "Henry Clay" and "Eagle Head" patterns, do you?

A. No, sir.

Q. How is it the custom of those who buy carpets from you to designate the designs they wish? How do the orders read?

A. The orders read "ship me such a number, such a color;" the number is the number of the pattern, and we indicate the color by a letter.

Q. What was your number for the pattern in question?

A. "1008."

Q. Did you ever receive any orders for "No. 1008?"

A. Yes, sir, or we should not have sold so many of them. I do not know that we ever received an order for "No. 1008," unless accompanied by orders for other patterns.

(Mr. Cleeman requests the witness to refresh his memory, in this respect, by examination of his order-book, and give the master the result. He also requests the witness to consult his books, and give what "fancy patterns" he sold more of during the time he was selling the pattern in question, and what patterns he sold less of than of the pattern in question, during the same period, giving the
132 number of yards, approximately, of each. "I mean all of the fancy patterns you sold during those two years in question.)

Re-examination by Mr. WHITE:

Q. How do the customers get at the numbers of your carpets to make orders?

A. They get the numbers from our traveling agents, who exhibit samples of the manufactured carpets.

Adjourned to Monday, Dec. 31st, 1877.

DECEMBER 31ST, 1877.

Mr. DOBSON continues:

In answer to the question of how often we received orders for "1008," I state that only in three instances did we receive orders for that number alone, and these were for single pieces. In other cases it was included in orders for our general line of goods.

I now present the numbers of the "fancy patterns" of a similar character to that in question, with the amount made of each:

No.	1001	572 pieces.
"	1007	503 "
"	161	425 "
"	179	270 "
"	198	551 "
"	170	279 "
"	171	268 "
"	176	254 "
"	173	589 "
"	1005	148 "
"	55	285 "
"	123	385 "

133 (Mr. Dobson desires to correct his testimony at the last meeting, by substituting the number 123 for Nos. 125 and 126, wherever they occur.)

In answer to the master's request, I will state that in 1874 we made 4,509 rolls, aggregating 507,852 yards of ingrain carpets. This was in ten months about, as strikes, etc., prevented our running full time. In 1875 we made 5,401 rolls, aggregating 611,880 yards, running full time. This includes all ingrain carpets.

Q. By Mr. CLEEMANN: Those designs you have mentioned, are they all the fancy designs you made in those two years?

A. Oh no; we have quite a number of similar designs, that we made from 5 pieces up to 100 pieces during the same period; we selected the 12 mentioned, because they were our leading patterns, and we made more of; they were those we sold most of; some of these patterns were substituted for the pattern in question, without objection on the part of the purchaser.

Q. State what pattern you substituted for 1008.

A. I think it was 173, I am not sure as to the number; the pattern had a wreath centre, similar to 1008, and had a sheaf of wheat for the jewels, and was only substituted when our customers had ordered "1008 or something similar." I cannot name the parties, but I know the fact; I remember the letter; there is no doubt it was done; I cannot say whether these parties had seen "1008" before they accepted the substitute, but very likely they had.

(Mr. Cleeman calls for the letters mentioned by the witness, in which the orders were.)

JAMES DOBSON.

Sworn and subscribed before me, this 31st day of December, 1877.

JOHN CADWALADER, JR., *Master.*

134 JAMES JUDGE sworn:

(Mr. Cleeman asks what is to be proved by the witness.)

(Mr. White states he proposes to show the value of patterns for carpets.)

(Mr. Cleeman objects.)

(Objection overruled.)

Examination: I am a carpet manufacturer at the corner of Columbia avenue and Leib street at present. I have been about sixteen or seventeen years in business. I am conversant with the value of patterns in the manufacture of ingrain carpets, a little.

Q. What is the highest price such patterns bring in the market?

(Objected to, as irrelevant.)

A. I can only speak of those patterns that I have used. I never knew a pattern to cost over ten dollars; from that down to a dollar and a half. The extra supers that Messrs. Dobson and Messrs. Dornan make cost more than my patterns. From my judgment and knowldge, twenty-five dollars would be the biggest price to be paid by anyone for a pattern for ingrain carpet. The size of the design makes the difference in price.

Q. Does the merit of the design enhance the price in the market?

A. Well, no; that is, we never get any more for one design than another which has the same coloring. Some designs certainly make the carpets more salable than others.

Q. How are your carpets graded?

A. In the trade they are graded as three-plys, extra supers,
135 and medium supers; there are several grades below the last. They put several, in fact many, patterns in each grade. The price of carpet is regulated by the grade, and not by the pattern; I never knew a pattern to command a royalty; some of the boys made me pay for one. I was sued for an infringement, and was obliged to settle with the owner of the pattern.

Examined:

Q. Some of these patterns which you say were sold from $1.50 to $25 dollars were patented designs, were they?

A. That I can't say; some of those I have used may have been patented; they were not offered for sale as patented designs.

Q. Were they designs that had already been tried in carpets and sold, or were they new designs?

A. Well, I guess there were some of both, because I have got a copy, and got the designer to imitate it; some I bought original; the originals had never been used in carpets so far as I know.

JAMES JUDGE.

Sworn and subscribed before me, this 31st Dec., 1877.

JOHN CADWALADER, Jr., *Master.*

136 And on the day and year last aforesaid, the master comes into our said court here and files of record the defendants' exceptions to his report and his supplemental report, which, being read, is as follows, to wit:

Exception to Master's Report.

In the Circuit Court of the United States for the Eastern District of Pennsylvania. Of April Sessions, 1874, No. 2. In Equity.

DORNAN *et al. vs.* DOBSON *et al.*

John Dobson and James Dobson, trading as John & James Dobson, the defendants in the above-mentioned case, by their attorney, Richard P. White, except to the report of the master, John Cadwalader, Esq., for the following reasons:

First. The learned master erred in reporting that the remarkable popularity of plaintiff's design was shown by the fact that the Dobsons' sales of the infringing patterns were $\frac{1}{21}$ of the whole of his manufacture, although they had over one hundred and twenty designs, thus totally overlooking the testimony on page 6, defendant's testimony, that there were only twelve patterns of this class,
137 and that three of them sold better than the infringing pattern, and most of the others nearly as well.

Second. The learned master erred in reporting that no testimony was offered to show what the value was of a design that had been put in use and proved popular, the uncontradicted evidence being that no pattern, tried or untried, had been known to bring over twenty dollars, and that plaintiff had ceased to patent because no

patent was worth the twenty-five dollars which a patent costs. No evidence was offered to show that this or any other pattern was worth, or if offered for sale would bring, more than the price named.

Third. The learned master erred in relying on the case of Gorham Co. *vs.* White, 14 Wallace, 511, on the point of value, because—

1st. There was no reference to the Gorham case before the master, and the defendant had no opportunity to be heard upon it.

2d. The value of the design for silver-ware has no bearing upon the value of a design for carpets.

3d. In the Gorham case the value referred to was, the value as it appeared from evidence given.

In this case all the evidence showed that the carpet design was not worth over twenty dollars at the outside.

Fourth. The learned master erred in relying on the fact that the Dobsons had in use one hundred and twenty patterns, and more than one-half of all the ingrain carpets made by them were made on twelve or thirteen designs, as evidence of special value in the design in question, the fact being that those twelve or thirteen designs were the only designs in use on the class of carpets most in
138 demand, and that some of these designs sold better, and most of them sold as well as the infringed design.

Fifth. The learned master erred in considering reports of other cases not before him in any way, and as to which the defendants had no opportunity to be heard in explanation.

Sixth. The learned master erred in reporting that the Dobsons, for the purpose of obtaining custom, sold their carpets at 10 to 15 cents per yard below plaintiffs' prices, and that the Dobsons could, if this had not been their object, have sold at the same prices as the Dornans did, and thus have earned an equal profit, whereas the evidence was that the Dobsons, who were then beginners in the business, turned out a carpet which was inferior in weight, in color, and in salability, and which would not bring within ten to fifteen cents of the price brought by Dornan's carpet.

Seventh. The learned master erred in finding that the Dobsons, by means of the infringement, diverted custom from plaintiff. Field, Leiter & Co. became customers of the Dobsons before the infringing pattern was made, and the only other customers whose reasons for buying from Dobsons were shown bought an inferior carpet from Dobsons because the Dornans could not supply them with a better article.

Eighth. The learned master erred in finding that the plaintiffs would have sold an added quantity equal to the quantity sold by the Dobsons but for the infringement, the evidence being—

1st. The Dornans' sales in 1874 and 1875 were fully up to their average production.

2d. That these sales exceeded their capacity to supply their customers.

139 3d. That the carpets were, on plaintiffs' own showing, so inferior that nothing but their inability to supply them enabled the defendants to make their sales.

Ninth. The learned master erred in reporting that the plaintiffs

sustained damage of over $6,008.60 by infringement of a pattern, the whole proprietary right to which was not worth over twenty dollars, and which did not add one cent value to the carpet on which it was used.

Tenth. The learned master erred in finding that the Dornans lost the sale of the carpet on which the infringing pattern was used, there being no evidence on which to base such finding.

Eleventh. Because there was no evidence to show what portion of Dornan's profits, if any, were attributable to the designs infringed.

Twelfth. Because the evidence as to damage was insufficient, and speculative merely.

Thirteenth. Because on all the evidence in this case the plaintiffs, if entitled to damage at all, were entitled to nominal damages only.

Fourteenth. Because there was no evidence to show what proportion of profits, if any, was due to the patent alone, and therefore the damages, if any, should have been only nominal.

R. P. WHITE,
Per M.,
Attorney for J. & J. Dobson, Defendants and Exceptants.

140 *Supplemental Report upon Exceptions Filed to Master's Report on the Part of Defendants.*

Circuit Court of United States for E. District of Penna. Of April Session, 1874, No. 2. In Equity.

DORNAN *et al. vs.* DOBSON *et al.*

The master, having considered the exceptions filed on behalf of the defendants to his report, does not find therein any ground requiring a change in his findings, for the following reasons:

As to the first exception, the testimony quoted in the exception is insufficient. On page 7 of defendants' testimony Mr. Dobson testifies as follows:

"Q. By Mr. CLEEMAN: Those designs you have mentioned, are they all the fancy designs you have made in those two years?

"A. Oh, no. We made quite a number of similar designs that we made from 5 pieces up to 100 pieces during the same period. We selected the 12 mentioned because they were our leading patterns and we made more of—they were those we sold most of."

It appears therefore from this portion of the testimony that more than half of all ingrain carpets made by them were of 13 designs, and confirms the master's report.

Second exception. The master has examined the testimony
141 and can find no reference to a sale or evidence of the value of a tried pattern. The evidence referred to designs in designer's hands.

On page 5 defendants' testimony Mr. Dobson testifies when asked—

" Why do you prefer a good to a bad design?

"A. For the same reason that I prefer a good horse. If you get a good design and good colors you get a good and salable carpet.

"Q. Does a bad design make a carpet less salable?

"A. Certainly.

"Q. You buy the designs from the designers before they have been made into carpets, do you not?

"A. Yes, sir."

Third exception. The case of the Gorham Co. *vs.* White was cited by counsel for complainant, and a copy of the judge's opinion furnished to the master in pamphlet form.

Fourth exception. The master has quoted the above testimony which seems to meet the objections here made.

Fifth exception. The cases quoted by the master were handed to him by the counsel for the complainants and a copy of the list was furnished to defendants' counsel, who furnished counter authorities. These were furnished after the oral arguments had been concluded.

Sixth exception. It having been shown that the defendants' carpet infringed the complainants' design and that the carpets were mistaken for the same, the fact that the Dobsons' carpet was in reality of inferior quality to the Dornans' only increased the injury done the latter by exposing their patented carpet to an injurious charge.

142 It was a natural inference from the fact that the carpets were purchased in the market as the same that they could command the same price.

The remaining exceptions, numbered 7, 8, 9, 10, 11, 12, 13, and 14, respectively, the master does not think require specific consideration. He is of opinion that his conclusions on the several subjects were justly and fairly drawn from the evidence, and he therefore reports the exceptions, with the foregoing considerations, to the court.

Respectfully submitted,

(Signed) JOHN CADWALADER, *Master.*

143 And afterwards, to wit, on the 3rd day of October, A. D. 1882, this cause coming on for argument on defendant's exceptions to the master report, and having been argued by counsel for the respective parties, the court entered the following decree, to wit:

U. S. C. C., E. D. of Pa. April Sess., 1875, No. 2. In Equity.

DORNAN *vs.* DOBSON.

And now, to wit, October 3rd, 1882, this case coming on to be heard upon exceptions to the master's report, after hearing counsel for the respondents and complainants, the court order, adjudge, and decree that the exceptions be overruled and the report of the master confirmed, and that the said defendants, John Dobson and James Dobson, forthwith pay to the complainants the sum of six thousand one hundred and twenty-eight $\frac{79}{100}$ dollars.

144 And afterwads, to wit, on the 10th day of October, A. D. 1882, the respondents, by their counsel, R. P. White, Esq., ap-

pear in open court and pray an appeal to the Supreme Court of the United States: whereupon the court made the following order, to wit:

In the Circuit Court of the U. S. for the E. D. of Pa., April Sess., 1875, No. 2. In Equity.

JOHN DORNAN, FRANCIS MAYBIN, ROBERT DORNAN, and JOHN PICKINS, Trading as Dornan, Maybin & Co.,

vs.

JOHN DOBSON and JAMES DOBSON.

And now, to wit, October 10th, 1882, R. P. White, counsel for the defendants, appears in open court and prays an appeal to the Supreme Court of the United States from the decree of this court dismissing the exceptions of the defendants and confirming the master's report, &c.; and the same is allowed with security fixed in the sum of $12,500.00.

145 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit. April Sess., 1875. No. 2.

JOHN DORNAN, FRANCIS MAYBIN, ROBERT DORNAN, and JOHN PICKENS, Trading as Dornan, Maybin & Company,

vs.

JOHN DOBSON and JAMES DOBSON.

Know all men by these presents, that we, John Dobson and James Dobson, as principals, and Sevill Schofield, No. 4216 Main St., Manayunk, and William Arrott, No. 2010 Spring Garden street, all of the city of Philadelphia, and State of Pennsylvania, are held and firmly bound unto the above-named John Dornan, Francis Maybin, Robert Dornan, and John Pickens, trading as Dornan, Maybin and Company, in the sum of twelve thousand five hundred dollars ($12,500), to be paid to the said John Dornan, Francis Maybin, Robert Dornan, and John Pickens, trading as Dornan, Maybin and Company, their certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our respective heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this —— day of —— A. D. 188—.

Whereas, lately at a circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, in a suit depending in the said court between John Dornan, Francis Maybin, Robert Dornan, and John Pickens, trading as Dornan, Maybin and Company, complainants, and John Dobson and James Dobson, respondents, a final decree was rendered against the said John Dobson and James Dobson, and the said John Dobson and James Dobson having taken an appeal, which appeal has been allowed by the said

circuit court, to the Supreme Court of the United States to reverse the said decree in the aforesaid suit:

146 Now, the condition of this obligation is such that if the said John Dobson and James Dobson shall prosecute their said appeal to effect, and answer all damages and costs, if they fail to make their appeal good, then this obligation to be null and void; otherwise to remain in full force and virtue.

JOHN DOBSON. [SEAL.]
JAMES DOBSON. [SEAL.]
SEVILL SCHOFIELD. [SEAL.]
WILLIAM ARROTT. [SEAL.]

Sealed and delivered in the presence of—
SAMUEL BELL,
W. VON A. WILLIAMSON.

Approved:

W. McKENNAN,
Cir. Judge.

[Endorsed:] No. 2. April sess, 1875. Circuit court United States. Dornan *et al. vs.* Dobson *et al.* Bond sur appeal. Filed October 12, 1882.

147 THE UNITED STATES OF AMERICA, *ss:*

To John Dornan, Francis Maybin, Robert Dornan, and John Pickens, trading as Dornan, Maybin and Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, wherein John Dobson and James Dobson are appellants and you are appellees, to show cause, if any there be, why the decree rendered against said appellants, as in said appeal mentioned, shall not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand, this twelfth day of October, in the year of our Lord one thousand eight hundred and eighty-two.

W. McKENNAN,
Cir. Judge.

147½ I hereby accept service of the within citation, and require the clerk to enter my appearance for the appellees.

L. C. CLEEMANN,
Attorney for the Appellees.

Oct. 31, 1882.

148 UNITED STATES OF AMERICA, }
Eastern District of Pennsylvania, } *sct:*

I, Samuel Bell, clerk of the circuit court of the United States of America for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of John Dornan,

Francis Maybin, Robert Dornan, and John Pickens, trading as Dornan, Maybin & Co., *vs.* John Dobson and James Dobson, on file and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court at Philadelphia, this second day of March, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of these United States the one hundred and seventh.

[SEAL.] SAMUEL BELL,
Clerk of C. C.

Endorsed on cover: E. Pennsylvania C. C. U. S. No. 482. John Dobson and James Dobson, appellants, *vs.* John Dornan, Francis Maybin, Robert Dornan, and John Pickens, trading as Dornan, Maybin & Company. Filed 9th March, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 202.

JOHN DOBSON *et al.*, Appellants, *vs.* JOHN DORNAN *et al.*, Appellees.

And now, October 31, 1885, it is stipulated by and between the parties to above appeal, by their respective counsel, that the transcript of record on file in the Supreme Court be amended by adding thereto a copy of the letters patent on which the suit was brought in the circuit court, which was offered in evidence therein, but which copy was inadvertently omitted from said transcript, and to that end the copy of the said patent hereto annexed may be presented by the clerk of the Supreme Court as an appendix to said transcript of record, and the same shall be treated as a part thereof, with like effect in all respects as though it had originally been made a part of said transcript of record, and so certified.

A. T. FENTON,
Of Counsel with Appellants.
L. C. CLEEMAN,
Of Counsel with Appellees.

UNITED STATES PATENT OFFICE.

CHARLES A. RIGHTER, of Philadelphia, Pennsylvania, Assignor to DORNAN, MAYBIN & Co., of same place.

Design for Carpet.

Specification forming part of design No. 6822, dated August 19, 1873; application filed August 8, 1873.

To all whom it may concern:

Be it known that I, Chas. A. Righter, of the city of Philadelphia, county of Philadelphia, State of Pennsylvania, have invented and produced a new and original design for carpets, of which the following is a specification:

The nature of my design is fully represented in the accompanying photographic illustration, to which reference is made.

I claim as my invention—

The configuration of the design hereunto annexed, when applied to carpeting.

CHAS. A. RIGHTER.

Witnesses:
JOHN C. GRIFFIN,
ARTHUR MacMASTER, Jr.

[Endorsed:] 202. Oct'r term, 1885. U. S. Supreme Court. John Dobson *et al.*, appellants, *vs.* John Dornan *et al.* Stipulation amending transcript of record. [Stamped:] Office Supreme Court U. S. Filed Nov. 14, 1885. James H. McKenney, clerk.

118-10

FILED
MAR 1 1886
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

No. 202. October Term, 1885.

JOHN DOBSON and JAMES DOBSON,
Appellants,

vs.

JOHN DORNAN, FRANCIS MAYBIN, ROBERT DORNAN, and JOHN PICKENS, trading as DORNAN, MAYBIN & CO.

BRIEF FOR APPELLANTS.

HECTOR T. FENTON,
RICHARD P. WHITE,
Counsel for Appellants.

PHILADELPHIA:
DUNLAP & CLARKE, PRINTERS, HASTINGS' BUILDING, 819 & 821 FILBERT ST.
1886.

Supreme Court of the United States.

JOHN DOBSON AND JAMES DOBSON,
Appellants,

vs.

JOHN DORNAN, FRANCIS MAYBIN, ROBERT DORNAN, and JOHN PICKENS, trading as DORNAN, MAYBIN & Co.,
Appellees.

No. 202.

October Term,

1885.

STATEMENT OF THE CASE.

This is an appeal from the Circuit Court of the United States, for the Eastern District of Pennsylvania, by John Dobson and James Dobson, who were defendants below, and against whom the said Court entered a decree in equity for the payment of $6,128.79 and costs, and awarding a perpetual injunction, at the suit of John Dornan *et al.*, trading as Dornan, Maybin & Co., appellees and complainants below.

The bill is founded on Letters Patent of the United States, No. 6,822, dated August 19, 1873, for the term of three and a half years, granted to the appellees as assignees of Charles A. Righter, for a design for carpets.

The bill, which was filed February 12, 1875, charged the appellants with the unlawful use of said design in the manu-

facture of carpets, in infringement of the alleged exclusive rights of the appellees, claimed to be secured to them by the said design Letters Patent.

An Answer was filed, denying that the defendants had made or sold any carpets bearing the patented design. Proofs were taken by the plaintiffs and by the defendants, and the cause having come on to be heard thereon, the Circuit Court, on 25th of April, 1876, entered a decree awarding an injunction, as prayed for in the Bill, and referring the cause to a Master, to take and state an account of "the gains, profits, and advan-"tages which the said defendants have received, or which have "arisen or accrued to them, from infringing upon the exclusive "rights of the said complainants, by the manufacture, use, and "sale of carpeting bearing said patented design, and, also, "what damages in addition thereto have been suffered by the "complainants, by reason of said infringements."

In pursuance of his appointment, and by virtue of this decree, the Master heard the parties and their witnesses, and, after careful consideration, filed his report, to which exceptions were filed in due season by the appellants. The matter of these exceptions came on to be heard by the Circuit Court, and was argued by counsel, whereupon the said Court, on the third day of October, 1882, entered a decree, sustaining the Master's Report, overruling defendants' exceptions thereto, and awarding damages to the complainants, as stated, with costs, whereupon the defendants appealed to this Court.

SUBJECT-MATTER OF THE PATENT; AND HEREIN OF THE ISSUES ARISING UNDER THE PLEADINGS, AND UNDER THE REFERENCE TO THE MASTER.

The Patent, in its title, purports to be for a "Design for Carpet;" and the entire descriptive part of the specification, if it may be called "descriptive," is contained in eighteen words, as follows: "The nature of my design is fully represented in the accompanying photographic illustration, to which reference is made." This is followed by the claim in the following words: "I claim, as my invention, the configuration of the design hereunto annexed, when applied to carpeting." These quotations constitute the whole specification, and reference must be had to the drawing or photographic illustration accompanying it, to obtain even an idea of the general nature of the design, leaving the public wholly in ignorance as to whether the novelty resided in the design as a whole, or in any special coloring or arrangement of parts, or in the elements constituting the whole design.

The testimony before the Examiner was directed, on the part of the plaintiff, to show that the defendants' carpets closely resembled those of plaintiffs' bearing the patented design; and the proofs submitted by defendants tended to show how far the design was well known, and also directly combatted the idea of substantial similarity between plaintiffs' and defendants' designs; they were contradictory and of nearly equal weight on this latter point; so that the Court evidently decided the question of infringement with little aid other than ocular inspection of the samples; and found in favor of the plaintiffs on this question and on that of the validity of the patent, the only two issues under the pleadings.

Although it is quite apparent that the designs, as such, are not alike, though having a general similarity of appearance (as stated by plaintiffs' witness, Dixon Bean, Record, page 9, folio 17); they are not sufficiently alike under the test applied in Gorham Co. *vs.* White, 14 Wallace, 511, to warrant the conclusion that the design pattern on defendants' carpets infringed the plaintiffs' patent, more especially as this patent, in the absence of any descriptive specification, should have been construed in its narrowest sense, viz., for the whole design as a unit, so that a pattern containing anything less than the whole or differing in some of its parts would not fall within the limits of the claim. That the defendants' design did not contain the whole pattern, as shown in the patent, is not contradicted; indeed, is admitted by every witness on both sides; the plaintiffs' witnesses claiming, and the defendants' witnesses denying, that the two designs were in "general appearance" alike. The testimony on this question will be noticed more in detail hereafter. It is contended, however, that the patent is void on its face, in that the specification is vague, uncertain, indefinite and insufficient, lacking all the essential features of a descriptive paper pointing out the nature of the invention and wherein the novelty of the thing claimed resides, as required by the statute. It contains no description whatever; and, like the claim, refers to the drawing. In brief, the patent is nothing more than a certificate of the registry in the Patent Office of the design shown in the illustration, without a single word of explanation accompanying it other than that it is applied to carpeting. If such a patent can be sustained, it would amount to a judicial interpretation of the statute relating to design-patents, that no descriptive specification is required in a patent for such inventions. A further discussion

of this subject will be found in the Argument. The interlocutory decree adjudged the patent to be valid; also, that the defendant had infringed the same, and ordered an account of profits and damages. The record contains no opinion of the Court below, and it is presumed that none was delivered.

Before the Master, it clearly appeared that the defendants had realized no actual profits on the carpets made and sold by them bearing the design adjudged to infringe the plaintiffs' patent (see Master's Report, Record, page 37), and the Master's calculations are based upon the damages, so-called, alleged to have been sustained by the plaintiffs; and these damages he computed by finding the quantity of such carpet made and sold by defendants, the net profit per yard made by plaintiffs on their own carpet bearing this design, and presuming that the former displaced the latter on the market, the Master awarded to the plaintiffs a large sum of money, being the total profit they claim they would have made on the carpet made and sold by defendants, had they, the plaintiffs, made and sold the same.

MASTER'S REPORT; EXCEPTIONS THERETO, AND FINAL DECREE.

Proofs were adduced before the Master to show the quantity of carpet made and sold by the defendants bearing the design adjudged to infringe the plaintiffs' patent; also, to show that the plaintiffs had a large trade for the carpet made by them bearing the patented design, and what average profit they made on the same during the time covered by the adjudged infringement; and (though finding that defendants actually suffered a loss on their total manufacture of said carpets) found as a conclusion, based wholly upon presumption, that these

sales by defendant deprived plaintiffs of selling a like quantity of their own goods, and therefore deprived them of the aforesaid profit they would consequently have derived therefrom, and awarded them this sum accordingly, amounting to $6,008.62. No testimony was adduced by the plaintiffs to show that the parties who bought of defendants would have bought of the plaintiffs, or that the design added to the value of the carpet to which it was applied, or the extent of such value, or that it increased the demand for the carpet over and above any other equally popular design patented or unpatented, or any evidence tending to separate the part of the price of the carpet or the profit thereon due to the design from that due to the material, quality, color or excellence of manufacture of the carpet itself; or in any other way sufficiently identify the alleged profit found as belonging or due to the design shown in the patent in suit. Some testimony on this subject was taken on behalf of the defendants, but the objections stated to the insufficiency of the plaintiffs' proofs, were earnestly pressed before the Master, and before the Court, and form the subject of the exceptions to the Report. These were argued, overruled by the Court, and a final decree entered as stated. No opinion was delivered, so far as appears by the Record, but it is fair to presume that the Court in this case followed and applied the ruling and principles of the decision adopted in a similar case decided by it at the previous term, [Hartford Carpet Co., *vs.* Dobson, 10 Fed. Rep. 385; S. C., reversed, 114 U. S. 439], as that decision of the Circuit Court is extensively quoted from and forms the basis of the Master's conclusions. See Report, Record, page 37.

ASSIGNMENTS OF ERROR.

I. The Court below erred in entering an interlocutory decree adjudging to be valid the letters patent on which the bill was founded; because the same were void on their face, there being no description of the alleged invention or any sufficient specification thereof accompanying the said letters patent as required by the Statute.

II. The Court below erred in not dismissing the bill, because the true construction of the patent in suit, in view of the very general nature of the specification and of the evidence of want of novelty in the general plan of the design, confined it within such narrow limits, that the weight of the evidence on the issue of infringement was clearly with the appellants.

III. The Court below erred in not dismissing the bill because the patent, if sustained at all, should have been construed for the design as a whole, in the nature of a combination of old elements; and in view of the absence of novelty in the general plan of the design, the uncontradicted evidence that the appellants' design was not the same as appellees' in detail (wherein alone its novelty resided), was decisive of the issue of infringement in favor of the appellants; and was not overcome by the plaintiffs' proofs that the designs, though unlike in detail, were the same in general appearance, because such similarity was clearly due solely to what was old and *not* patented, viz.: similarity in general plan, and similarity in coloring.

IV. The Court below erred in entering an interlocutory decree against the appellants; which was in excess of the relief prayed in the bill, and too broad in its terms in that the Mas-

ter to whom the cause was referred was therein and thereby directed to state an account upon the basis of profits realized by the defendants from the "manufacture, use, and sale of carpetings bearing said patented design"; whereas the Master should have been directed to state an account upon the basis of "profits realized from the use of the design upon the carpets made, sold, and used by said defendants."

V. The Court below erred in overruling appellants' tenth exception to the Master's Report, which was as follows: "The learned Master erred in finding that the Dornans lost the sale of the carpet on which the infringing pattern was used, there being no evidence on which to base such a finding;" because it clearly appears not only in the record, but in the Master's Report (see Record, page 37), that such finding was based mainly upon a presumption that the appellants' goods displaced those of the appellees' in the market, to the extent of appellants' sales.

VI. The Court below erred in overruling appellants' eleventh exception to the Master's Report, which was as follows: "Because there was no evidence to show what portion of Dornan's profits, if any, were attributable to the design infringed;" for the exception was well taken in view of the fact that the appellees having proved that they made and sold a certain carpet of high grade, bearing this design, at so much profit per yard, rested, without further proof of value or profit, and the Master accepted such evidence of profit and adopted it as a measure of profits and damages against defendants, who had made a wholly different grade of carpet, of less value, selling for less in the market, and on which the evidence was uncontradicted that they had made no profit.

VII. The Court below erred in overruling appellants' twelfth exception to the Master's Report, which was as follows: "Because the evidence as to damage was insufficient, and speculative merely;" for the exception was well taken in view of the fact that there was not even a scintilla of evidence in the case that the patented design in any manner contributed to the market value of the carpet made and sold by the appellees, or to that made and sold by appellants, or contributed to produce one cent of the alleged profit realized by the appellees on their carpet, or directly or indirectly influenced the sale of the carpets of either party; or that the appellees might, could, or would have supplied the alleged demand for the different grade carpets made and sold by the appellants; or that if they had done so, that the presence of the patented design thereon would have caused a single sale thereof, or produced a dollar of profit thereon.

VIII. The Court below erred in overruling appellant's fourteenth exception to the Master's Report, which was as follows: "Because there was no evidence to show what proportion of profits, if any, was due to the patent alone, and therefore the damages, if any, should have been only nominal;" for the exception was well taken in that the burden of proof was on the appellees to show by affirmative proof what proportion of the whole profit realized on the carpet bearing the patented design was due to the use of the alleged invention thereon, and for want of such proof the Master was not justified in presuming that the entire profit realized by appellees in the manufacture and sale of their carpet bearing the patented design was due in no manner to the carding, spinning, weaving, coloring or general excellence of quality or manufacture of the said carpet, but solely and entirely to the use of the alleged

invention, claimed to be protected by the patent; and therefore the Master erred in measuring and reporting damages by such a standard, based upon a presumption, without evidence, and under an erroneous view of the law governing the ascertainment of profits and damages in such cases.

POINTS OF ARGUMENT.

I. The Question of the Validity of the Patent.

Sufficiency of a specification, when presented as a question arising in a suit under the patent laws, is always open as a defence, but is usually difficult to solve adversely to the validity of the patent. This must necessarily be so in view of the fact that descriptive language, as well as drawings, convey more or less intelligible meaning, depending upon the extent of the previous learning in the art, to which they relate, of the mind endeavoring to understand their scope and import. This defence has frequently received judicial consideration in suits arising under functional patents; and, with rare exceptions, has it been sustained, mainly, for the reason already stated, and also because of the liberality with which the Court would deal with such an instrument as a patent, and in the endeavor to sustain it if at all possible. But, with respect to patents for designs, no reported judicial decision in any suit thereon has involved a discussion of this defence, or laid down any rule or standard by which to judge of what is and what is not a sufficient specification of the invention sought to be protected. Designs have been, and are, the subject of statutory protection, not only in the United States, but in the principal European States, but in the latter under a wholly different classification. In the former they are treated as inventions, in the latter as a

species of trade-mark or copyright. In the former they were not recognized as entitled to protection until the passage of the Act of August 29, 1842, 5 Stat., 209; whereas, in Europe they have received statutory protection since before the present century; as early as 1737 in France, and in England, first by Stat. of 27 Geo. 3, c. 38, enacted in 1787. The United States Statute of August 29, 1842, was repealed by the substituted Act of March 2, 1861, 12 Stat., 248, and that again by the present law, contained in Sect. 4929 to 4933, Rev. Stat. It is declared judicial interpretation of these sections after well-considered argument—Northrop *vs.* Adams, 2 B. & A., 567, s. c. 12 O. G., 430; Wooster *vs.* Crane, 2 Fish., 583; s. c. 5 Blatch., 282; and Simpson *vs.* Davis, 12 F. R., 144, that there must be *invention* involved in the design sought to be protected to entitle its author to the benefit of a patent; that is to say, it must be more than a mere fanciful sketch or more than a mere aggregation of figures, letters, or ornaments, which might be sufficient as a trade-mark or as a distinguishing symbol for the maker's goods; in brief, it must be a "new and original design." And in this view of it the statute provides, in Sect. 4929, Rev. Stat., that any person who * * * has invented or produced any new and original design * * * may, upon payment, etc., * * * "*and other due proceedings had, the same as in cases of inventions or discoveries, obtain a patent therefor;*" and in Sect. 4933, that "all the regulations and provisions which apply to *obtaining* or protecting patents for inventions or discoveries, not inconsistent with the provisions of this title (whereby is meant the term of the patent, and the fees therefor), shall apply to patents for designs." It is, therefore, clear that Sect. 4888, requiring that the specification shall contain a full, clear, and exact

description of the alleged invention, and shall particularly point out and distinctly claim the part, improvement, or combination claimed, applies equally as well as a *sine qua non* to the lawful issue of a patent for a design as for a new "art, machine, manufacture, or composition of matter;" and so, also, the other prerequisites required in such cases, viz.: that an application be filed, that the specification be signed and attested by two witnesses, that a drawing accompany the descriptive specification, and that an oath of invention and novelty be filed with the petition. And the application is subject to examination by the Patent Office as to its novelty and patentability. In all these respects the United States Statutes treat the design as an invention, as well whether it be a novel configuration of an article or an ornamental print, picture, or pattern, to be shown, described and claimed in the patent as such, wholly contrary to the laws of France and England, where simple registry, as by the deposit of a photograph or drawing of the design, with a statement of the nature thereof, *i. e.* whether it be for configuration or for ornament, the name of the author or proprietor, and the class of goods or article to which the design is applicable or applied, is all that is necessary to obtain protection; and no requirement is there made that the design shall necessarily involve invention, or be more than a mere aggregation of figures, words, lines, or ornaments, provided that it be novel in the sense of being distinguishable from what is already in use in the same class.

The United States Patent Office rulings (and there are no reported judicial decisions) on the subject of what ought, and what ought not, to be included in a design specification are not at all uniform; indeed, there is much contrariety of opinion among patent practitioners as to what are the essential requi-

sites of such a specification, and the requirements of the statute in this respect. Hence it will be found that while under some Commissioners of Patent, design patent applications have been closely scrutinized, and the same care and particularity required of applicants in the preparation of specifications as for patents for other inventions, yet under others, as in the case at bar, undue laxity has been permitted to such an extent as to make the patent an unintelligible instrument, wholly lacking in the requirements of the statute to make it a valid grant; for it is hardly open to question that unless the letters patent purporting to grant to the patentee an exclusive privilege to do something, or to permit it to be done under his license, describe that thing, to do which the privilege is granted, in such lines, pictures, figures, words, or letters, so as to enable the public, or such as may be skilled in that particular subject, to understand, at least in a general way, the subject matter of the grant, the letters patent would be void, not only as conveying no meaning on their face, but as issued without due authority of law for the grant.

Unless, therefore, this Court is prepared to say that, as respects all those design patents heretofore issued, of which the one involved in the case at bar is a fair specimen. a mere registry of a drawing or photograph, with a statement of the class of the goods to which the design relates or is applied, accompanied by a petition claiming the design therein shown when thus applied, is all that is required by the statute, then the patent here in question must be held invalid, as absolutely lacking in the essential requisites of such an instrument, viz.: an accompanying written description of the nature and extent of the monopoly or privilege thereby and therein granted.

But the statute goes further than this, and requires that the specification shall not only state the nature of the subject matter of the patent, but shall "point out and distinctly claim" that part of it which is particularly intended to be claimed as of the patentee's invention. The Patent office has decided, *in re* Neidringhaus, 7 O. G., 171, that "if the specification and claim are deficient in the requirements of the law respecting clearness, exactness, and particularity, an application for a design patent should not be entertained by the Examiner." It is well settled by repeated decisions that what is shown or described but not claimed is impliedly disclaimed; and on the other hand, if the whole is broadly claimed, the patent would be void if the whole is not of the patentee's inventions. No patentee can escape from making a recorded declaration of what he intends his patent to include by refusing to make a specific claim, or by making it so broad that it is meaningless, viz., such as, "I claim the design, thing, or machine, or process shown or described. It is quite true that this Court in Dobson *vs.* Carpet Co., 114 U. S., 446, held that a claim in general terms for the design *shown*, was sufficient; but this was qualified and explained in the opinion, to the effect that the drawing was part of the descriptive specification, and that the word "shown" was in that connection sufficiently comprehensive to mean "shown and described;" for a thing may be *described* to the mind by a drawing as well as by letters; but it is thought that this would not have been said of a patent in which there was an entire absence of descriptive words, and in which the claim referred solely and exclusively to the drawing, and was not aided by any description or specification.

The patent involved in the case at bar is just such an instrument, and the question of its sufficiency is believed to be fairly presented in the first assignment of error.

Two other criticisms may fairly be made here; first, as to the *language* of the claim of the patent, and second, as to the *language* of the interlocutory decree. The claim is phrased, "I claim * * * the *configuration* of the design," etc. Although the word "configuration" was perhaps here used by the draughtsman in ignorance of its true technical meaning, the defect is such that it makes the claim absurd and meaningless, and, had it been an English patent (in which country, by the laws in force prior to 1884, there were two statutes, one granting protection for designs of configuration, and the other for designs for ornament, with different terms of grant, different requirements, and under different regulations), it would undoubtedly have been held bad, for an erroneous registration would have been fatal. And for the same reason may it be held bad under the U. S. statute, for that clearly distinguishes by express language between design patents for inventions in new forms or configuration, and invention consisting in novel ornamentation.

The interlocutory decree, also, in that part of it ordering a reference to a Master, is, in fact, though perhaps unintentionally, erroneous in language—at least ambiguous—because inconsistent with the preceding adjudgment of profits, in that it directs an accounting for the profits, etc., accrued to appellants, etc., "from infringing upon the exclusive rights of the said complainants, by the manufacture, use, and sale of carpetings bearing said patented design," etc. It may fairly be argued that the use of this language was intentional, as the Master has, in fact, awarded the whole profit on the carpet and not on the design. (See Report on page 38, folio 62 of

Record.) If it was intended to award the latter only, the Master evidently did not so understand it (see Report on page 35 of Record, folio 57), nor did the Court afterwards, in entering the final decree confirming the Master's report, give it such a limited, but proper, scope and effect. In Littlefield *vs.* Perry, 21 Wallace, 228, this Court reversed the decree of the Court below, because it employed similar language to that here used, and upon this ground only, for the learned Chief Justice added, in his opinion, that the circumstances of that case might, perhaps, have induced this Court to sustain the final decree had the order of reference in the interlocutory decree been less broad.

II. The Issue of Infringement.

Proper decision of questions of infringement depends not alone upon comparisons of things, but upon the construction to be given to the paper creating the monopoly in the thing alleged to have been imitated; that is to say, its character, scope, and meaning.

The second and third assignments of error relate to this branch of the case. Under these it is claimed that there was error in not construing the patent, if sustained at all, to be so narrow, in view of the general nature of the specification, of the evidence that the general plan of the design was old, and that the patentee was really entitled, if to anything, only to that special interpretation or detail embodiment of the old general plan, that the defendants did not infringe the patent by the employment of a pattern made in their own establishment, which was but another and substantially different interpretation or detail embodiment by themselves of the same old general plan that was the foundation as well of the patentee's

design. And here it was that the learned Circuit Judge was misled in deciding the issue of infringement by comparisons of entireties only; for though it was beyond question that the designs differed in detail, but were somewhat alike in general appearance, such similarity was due, not to what the patentee had invented, but solely to what was old and *not* patented, viz.: similarity in general plan and similarity in coloring.

Patents are granted upon *ex parte* applications, and are therefore to be construed most strongly against the patentee in the sense that what is not specifically claimed therein is no part of the monopoly, and therefore a broad claim in general language for the thing shown or described, especially where it is matter of common knowledge that the elements, or some of them, are old (and of which the Court will take judicial notice, Western Electric Co. *vs.* Odell, 18 Fed. Rep. 321, following Brown *vs.* Piper, 91 U. S. 37), the claim must be construed as for the design as an entirety; so that, the parts being old, if the novelty of the design consists in the new or different arrangement of the old figures, or in the addition to the old figures of a new one, and such change, though sufficient to constitute technically a new design, is not sufficient to create such decided novelty as to alter the general appearance and leading or striking features of the *tout ensemble* of the picture presented, then, manifestly, a subsequent designer is not to be debarred from doing likewise, even though the resultant, arising from adoption of the old groundwork used by both, might, by containing the same general and striking, though old, features, present the same general appearance as the patented design.

Either, therefore, this course must be open to the subsequent designer and the public, or else the patent, in such case, must

fail for want of sufficient novelty in the design, as a whole, intended to be covered by it.

The proofs establish just such a case here. It is not denied that the appellants' design in question was actually made in their own establishment, by their own designer; and the complainants' first witness conceded that they are different, and his testimony states the facts necessary to illustrate and support the views here contended for, and presented in the second and third assignments of error. He admitted (Record, page 9, cross-examination) that he could not find in the appellants' design one object which is like any object in that of the appellees; that every part of the pattern was different. He further testified as follows, Record, page 9, folio 17:

Q. Be good enough to point out wherein they resemble each other, except in the general coloring and the size and position of the medallions.

A. I don't know as I could.

Q. Can you say that the two designs are substantially the same, taken as a whole or taken in detail?

A. I think I answered that by saying that they are not alike in design; but taking a glancing look at them, they have a similar appearance.

Q. It is no uncommon thing, is it, for carpets made by different makers, and of clearly different designs, where the objects are nearly the same size, and belonging to the same general class, and the colors beirg the same, to have the same kind of similarity that you observe in these?

A. I have seen cases of that kind.

Q. Is there any difficulty in perceiving that these two exhibits are of different designs, whatever general similarity, such as you have alluded to, there may be between them?

A. No, sir.

Q. The similarity of which you speak, then, is not such a similarity as would lead you to mistake one pattern for the other?

A. No, sir.

And this is followed by proofs on both sides, which go to establish that the general plan of the patented design was old, that the medallion centre was not novel with this patentee; in brief, that he designed simply the details of the pattern, following an old and well known general plan. That the general similarity spoken of, was due, therefore, not to what was original with the patentee, but exclusively to what was old, to wit, general plan and coloring, and in all other respects the carpets of the parties litigant were substantially different. These are fair deductions of facts, drawn from the whole evidence on both sides.

It is therefore contended, as stated in the said assignments of error, that the patentee's design was a mere improvement upon an old pattern, and in that light the claim is to be regarded and treated as would be a claim for a combination of old elements in a functional patent, or an improvement claim which would not exclude in its scope the original device of which it was an improvement, or any substantially different improvement upon the same old device, machine, or pattern. And this is the view intended to be presented in the previous part of this argument, as sound law with respect as well to design as to functional patents; for there is no good reason why, under such circumstances, a claim in a design patent should not be construed to be a narrow (in contradistinction to a broad) claim, in view of what is old in the pattern or design patented, as in the case of a functional patent; and so be decisive of the question of infringement.

And, therefore, because the appellants' design presents to the eye a general similarity in appearance to that of the appellees, it is not to be declared an infringement of the patent, if such similarity is due to what is old in both designs; for manifestly to give by construction a generic effect to such a claim would enable a patentee to deprive the appellants and the public generally from using that which was common before the appellees' patent, and prevent them from using such old and well known materials to build up thereon their own special and different superstructure, which is precisely what they did in this case, though the resultant picture necessarily bore a general resemblance to that of the appellees, due to both using the same common foundation plan and color.

Counsel are aware that this is advancing a new proposition for the construing of design patent claims, and that apparently it is in conflict with the language of the decision of this Court in Gorham *vs.* White, 14 Wall., 511, but it is only apparent, and not real, as in that case *non constat* than any part of the patented design had ever before been used or known.

Reflection upon the proposition here advanced must necessarily lead to one of two conclusions. If a design claim is to have a generic effect in every case, in the sense that infringement is to be determined simply by general resemblance, irrespective of how much of the design as a whole is original with the patentee, as Mr. Simonds in his work on Design Patents page 198, seems to think is the meaning of the decision in Gorham *vs.* White, then it follows that, as novelty must be determined the same way, that a patented design, though in every detail differing from what is old and in common use, possesses no patentable novelty as an aggregate entirety if it

retains as such any general resemblance to the old, sufficient to mislead any ordinary purchaser or observer, though the new and improved design may, as such, possess intrinsic merit, and the difference between it and the old be as clear as noon-day light to an ordinarily careful observer. If this conclusion is not the proper one, and it would hardly seem to be just or equitable, then it follows, as of course, that in such a case as the one presented, where a generic claim is introduced, phrased such as "The design substantially as shown" (which, notwithstanding the remarks in Dobson *vs.* Carpet Company, 114 U. S., is not conceded to be in compliance with the statute, but in direct violation thereof), the patent, to sustain it at all, must receive such a narrow construction as to confine it to a design not only resembling it in general appearance, but having those peculiar features which distinguish its origin as of the patentee's pencil.

And this view has authority to sustain it in the case of Holdsworth *vs.* McCrea, 2 L. R. (H. L.), 380, where the registered pattern, which was for a woven fabric, showed an ornamental chain surface with shaded stars upon it, forming, together, the design. The Court said, if what he claimed as his design consists, according to the pattern, of different parts, any one of which might be deemed a "design," his registration of the whole pattern amounts to a claim for the combination, not of any of the parts thus combined, *any one of which, therefore, taken separately, is not protected;* though the Court found that the parts, viz.: the shaded and bordered stars, and the ornamental chain surface, were each new. It is clear, therefore, that if the defendant in that case had used either the shaded stars or the ornamental chain surface alone, the Court, under its construction of the claim, must neces-

sarily have decreed that there was no infringement; yet clearly the defendant's design in either case would have borne a general resemblance to that of the plaintiff, sufficient, perhaps, under the principles of Gorham *vs.* White, to have constituted an infringement.

Applying these principles to the case at bar, it follows that the issue of infringement should have been determined in favor of the appellants. They, as well as the assignor of the appellees, had used that which was common as a foundation plan, improved the same, and thereby produced each his own new design, which necessarily resembled each other in coloring and general plan, because springing from the same common source, but each differing materially in every detail.

III. Errors in the Master's Report and the Decree Entered Thereon.

The five remaining assignments of error relate to the questions of law arising under the interlocutory decree and the accounting before the Master in pursuance of the reference contained in the interlocutory decree. The fourth is that the decree is erroneous in terms, that it is too broad, and directs an account of profits on the carpet and not on the design. This error has been already pointed out on a previous page of this brief, and commented on; the fifth assignment sets forth that the Master predicated his conclusions not upon any evidence that the defendant's act had driven the plaintiff's goods out of the market, but held that it was to be presumed that the plaintiffs had lost the sale (together with the profit they would have made thereon) of the number of yards of carpet, equal in extent to the defendants sales during the period of time covered by the account. In this it is contended

there was error; no such presumption arises from the mere act of infringement, more especially where the plaintiff's goods differ, both in intrinsic and in market value, from those of the defendant, and also where the infringement relates only to a part of the entire article. The Statute gives "actual" damages, Root *vs.* Railway Co., 105 U. S. 197; Philp *vs.* Nock, 17 Wallace, 460.

In Seymour *vs.* McCormick, 16 Howard, 480, cited on this point in Root *vs.* Railway, 105 U. S. 197, this Court said that "actual damages must be actually proved, and cannot be assumed as a legal inference from any facts which amount not to actual proof of the fact;" and this was said in a case in which the Circuit Court had instructed the jury that the plaintiff's damages might be determined by ascertaining the profits which, in judgment of law, he would have made, provided that the defendant had not interfered with his rights. The instruction was decided to be erroneous. This Court said: What a patentee *would have made*, if the infringer had not interfered with his rights, is a question of *fact*. It is not a judgment of law or legal inference that third persons would have bought of the patentee what they bought of the infringer, if the latter had not made and sold the thing patented. Such a rule of damages would be better entitled to the epithet of *speculative* rather than *actual*.

Indeed, this ruling has stood so long unquestioned, and been so generally accepted, that it has grown into text law. In Walker on Patents, sec. 563, after citing Seymour *vs.* McCormick, it is said: "In order to show that a patentee would have made a particular profit, if an infringer had not forestalled his sales, it is necessary to show that he would, but for that infringer, have made those sales; and to that end it is neces-

sary to show that he *could have supplied* the articles wanted, and that the persons wanting these articles *would have bought* them of *him* had no infringer interfered,"—citing Goodyear *vs.* Bishop, 2 Fisher, 161; Magic Ruffle Company *vs.* Douglas, 2 Fisher, 340; Sargent *vs.* Manufacturing Company, 17 Blatch., 247; Ingersoll *vs.* Musgrove, 3 Bann. & Ard., 304.

There was no evidence, or no sufficient evidence, to prove this fact. The only testimony in the record on the point is that of Robert Dornan (page 45, folio 73), who said, "We did lose some trade; we lost the trade of Field, Leiter & Co., and of others." But John Dornan testified (page 11, folio 19) that they were unable to supply a customer who wanted some of this carpet, because "we were ordered ahead upon it and could not let him have it." The lists of sales in evidence, however, show that the appellees' sales, in 1874 and 1875, were fully up to their average production; and also, that Field, Leiter & Co. (the only party named by the appellees' witness) were customers of appellants' long before the alleged infringement took place. Again, as was said in Maier *vs.* Brown, 17 Fed. Rep., 737, "Defendants' sales may have been the result of superior energy, diligence, and business capacity, or of the incidents of trade; and we think the burden is on the plaintiff to show that such sales were attributable to the increased value given to the article by the patent." It further appears in the appellee's proofs before the Master (Record, pages 48 and 49) that the appellants' goods were of a different quality, selling for less, and actually worth less, than appellee's goods of the pattern in question; and this difference was not only in the shade of coloring in the pattern, but in the weight, material, and quality of the carpet; in other words, it was a different grade of goods. There was not, therefore, the slightest evi-

dence to show that the appellees would or could have supplied the different grade of carpet made by appellants, or, if they had chosen to make it, that they could have sold a yard of it to any of appellants' customers; or that the appellees' sales were affected in any manner during the years in question. Indeed, there is some affirmative evidence in the record to the contrary; and, also, to the effect that this particular design in question did not increase appellants' sales of such grade of carpet; that their sales of this pattern of carpet was less than five per cent. of their entire sales of ingrain carpet during that period, and that they had other patterns at the same time of which the percentage of sales was larger. (See list of some of them; Record, pages 80 and 82.) Mr. Dobson's testimony (Record, page 80, folio 128,) is positive upon the question under discussion, and is not contradicted. He testified: "I do not think, in point of "fact, that we obtained a customer, or sold a yard of carpet, "more, in consequence of using this pattern. I have already "stated that we did not get a cent more for the goods by "reason of the pattern. The loss of a single pattern from our "stock would not affect our sales in a year. It is not so much "the pattern as the coloring of the pattern which renders it "salable. A good design poorly colored would be undesirable. "We could have used the same colors in other patterns, if de-"prived of this one. We had patterns on which we put the "same colors, at the same time, and sold more of them."

These facts appearing on the record, are referred to as contradicting or rebutting any such presumption that the Master thinks arise from the mere act of infringement, and constitute a full and complete answer in point of fact.

Again, not only was there the proof in the case, already referred to, that the appellants sold several other patterns of

the same quality of carpet, during the same period of time, to as large, and in some cases larger, extent, than the carpet bearing the design in question; but there was no proof to meet or contradict this, and the Master was not justified in *presuming* (even had there been no proof either way on the subject) that the appellants' sales of the grade of carpet in question (not necessarily or in fact the same kind as appellees') was due to the design or pattern.

A design, either as a novel form or configuration of an article, or as an ornamentation thereof, may or may not add to the salability, or to the market value, of the article to which the new form or ornamentation is given; on the other hand, if it does not happen to please the individual taste, it may retard the former and decrease the latter; and, in judgment of law, a thing does not necessarily possess any inherent, intrinsic, or even commercial value, or impart such to anything to which it is attached or forms a part, merely because it is patented. This is purely a question of fact, and must be proved, as any other fact in the case necessary to support the decree must be proved, by competent and sufficient legal evidence.

The interlocutory decree framed under Section 4921, Revised Statutes, awards profits as well as damages; but in the case at the bar, we are relieved of the necessity of discussing the question of what profits, as *profits*, the patentee is entitled to, for the evidence clearly established that the defendants made none, either by the use of the design, or in the manufacture of the carpet upon which it was impressed or woven; and the Master so reports, see Report, Record, page 34, folio 56. And, as was said in Elizabeth *vs.* Pavement Company, 97 U. S. 126, "If an infringer of a patent has realized no

profit from the use of an invention, he cannot be called upon to respond for profits." Nor, as was decided in Livingston *vs.* Woodworth, 15 Howard, 559, can a Court of Equity, in a case where no profits are shown to have accrued, give a decree for profits by way of damages, or as a punishment for the infringement.

The appellees, in the endeavor to obtain a substantial award, were therefore obliged to show damage by reason of the alleged infringement. The Master was of opinion that they had established the proposition, and he awarded them a large sum of money. This brings us to a consideration of the remaining assignments of error, the sixth, seventh and eighth, which may be discussed together, as they relate solely to the measure of damages. In reaching his conclusions, the learned Master, upon insufficient and inadmissible evidence, found the *complainants'* profits upon *their* carpets to be a certain sum; and, having the number of yards of carpet sold by the defendant, *presumed* that the infringing carpets (though different in quality and market value) displaced the others in the market, and hence that the *whole* profit which would have accrued to the complainants thereon, *estimated at the profit on their own higher grade carpets*, in every stage of the manufacture thereof, had they made and sold the same, is the measure of their damages; and the Court, overruling appellants' exceptions, ordered a decree accordingly.

There are several objections to this conclusion, not only on the evidence as it appears in the record, but in the law. The statute gives "actual" damages.

Apart from the question, already fully discussed, as to whether any presumption arose, from the mere act of infringement, that the appellants' sales were due entirely to the design

used, and therefore deprived the appellees of the benefit of sales of their own goods to that extent, the Master erred not only in measuring the damages by the profit that would have accrued on an entirely different grade of goods of different value; but he was clearly wrong in measuring damages by the entire profit on the manufacture and sale of the carpet. It was the *design* that was patented, not the *carpet* as an article of manufacture. Had it been produced upon a patented loom, the appellants, under this ruling, would have been obliged to pay the whole profits twice on it; and had it been colored by a patent dye-stuff, they would have had a third time to pay the *whole* profit. And the inapplicability of the measure adopted by the Circuit Court would be still more apparent in case of a design patent for a new form or configuration. An article of the new form may very well be covered by two patents in the hands of different persons. A user of such article, if obliged to pay the whole profit to the owner of the design patent, would again be liable for the whole a second time to the patentee of the article itself irrespective of its novel configuration or ornamentation. This reasoning, as shown in Seymour *vs.* McCormick, proves the justice of the rule that puts the onus on the patentee of showing not only that his invention gave value to the the thing to which it was applied, but the extent of that value; it is this latter, and nothing else, that belongs to him, and for which the defendant is liable to account.

The appellees not only failed to show that the design in question gave any value or increased salability to the carpet over and beyond that given by any other design of like character to carpet of like quality, or that the appellants' carpets, of different grade and quality and value, displaced appellees' goods in the market or affected their sales to any extent, or

that the appellees could have supplied the demand, or that they would or could have sold to the appellants' customers a yard of the carpet which the appellants sold; but failed also to offer any sufficient evidence to ascertain with reasonable accuracy what profit, if any, the appellees realized on their own carpets which they did sell; and no evidence, whatever, as to what profit, if any, they would or could have realized had they, the appellees, made and sold the carpet in question bearthe design alleged to infringe, which the appellants made and sold. The record is barren of any proof on which a substantial award could legally be founded.

It is not deemed necessary to re-argue, in this case, at any greater length, the question of the measure of damages, as the subject, with relation to design patents, was fully discussed and decided at the last term in the cases of Dobson *vs.* Hartford Carpet Company, and Same *vs.* Bigelow Carpet Company, 114 U. S., 439; and reference is made to the same and to the reasons stated and cases cited in the opinion, as decisive of the questions raised by the 6th, 7th, and 8th assignments of error suggested in the appellants' brief in the case at the bar.

In conclusion, it is respectfully and earnestly contended that the bill should have been dismissed for invalidity of the patent appearing upon its face, or if sustained upon a limited construction of the patent necessarily required by the state of the art, then the issue of infringement, under the evidence, must have been decided in favor of the defendant; also, that the order of reference in the interlocutory decree is erroneous in form and substance as being too broad; and lastly, that after the reference to the Master, the report and final decree should have been for nominal damages only, in the absence of

any sufficient legal proof that the appellants had ever realized any profits, or the appellees sustained any damage, by reason of the alleged infringement; and that upon the whole case, as presented in the Record, both the interlocutory and final decrees of the Circuit Court are erroneous, and should be reversed.

HECTOR T. FENTON,
RICHARD P. WHITE,
Counsel for Appellants.





SUPREME COURT OF THE UNITED STATES.

October Term, 1883. No. 482.

JOHN DOBSON and JAMES DOBSON,
Appellants,

vs.

JOHN DORNAN, FRANCIS MAYBIN, ROBERT DORNAN, and JOHN PICKENS, trading as DORNAN, MAYBIN & COMPANY.

BRIEF OF APPELLEES.

HISTORY OF THE CASE.

This was an outrageous case of piracy. The appellees were the owners of a patented design for a carpet pattern. The pattern was a very successful one, and among the largest of the customers of the appellees was the firm of Field, Leiter & Co. (See "Exhibit D," page 70, of record, being

the amount of carpeting sold by appellees bearing the patented design.) Field, Leiter & Co. sent a piece of the appellees carpet by one Dixon Bean to the appellants, whose factory, as that of the appellees, was in Philadelphia, and requested appellants to make carpet like it (page 8.) The appellants did so (page 8), and sold the carpeting so made to Field, Leiter & Co., at a price ten cents per yard cheaper than the appellees; they sold as much as 15,682½ yards (see "Exhibit A," being amount of carpeting sold by appellants bearing the patented design, page 62), as will be seen by the list of the sales in the above exhibits. Field, Lieter & Co. bought no more of the carpeting in question from appellees, after the appellants began to supply it at a lower price. The appellees, soon after the appellants commenced their infringements, notified them that they were infringing one of their patented designs. This appellees denied by a letter dated May 20, 1874 (page 20). The appellees filed their bill and the appellants filed their answer, setting out as their only defence a denial that they committed, or were committing, the infringements complained of (pages 5, 6). Upon taking the evidence, it was found that this denial was based upon the theory that the carpet they were selling was not an infringement on the patented design, because there were some trifling alterations in the figures composing the patterns. Witnesses were, however, called, who testified that the designs were substantially the same (pages 12, 16, 17). It was further shown that no inventive ability had been exercised by the designer who made the changes in the design. This designer admitted he had seen the patented design left by Bean before he made the one for appellants at appellants' factory (pages 27 to 30). By a description of the piece of carpeting left by Bean it appeared this contained but half the design, and the designer made a duplicate of this for the other half, whereas the two halves of the patented design were not exactly alike, and thus the patent and the infringement were slightly different. The appellants made and sold carpeting bearing this infringing pattern to the

extent of 52,042½ yards. (See "Exhibit A," page 62.) The appellees were unable to show, to the satisfaction of the Master, that the appellees had made any profit on their sales, but appellants sold their carpeting at ten cents a yard less than the appellees; they were new to the business and doubtless wished to make friends in the trade.

The appellees showed what profits they made on their carpet, and that but for the tortious acts of the appellants they would have made a profit on an equal amount of carpet as that sold by the appellants. (See "Exhibit A," page 62, and "Exhibit D," page 70.)

The Master made a decree in favor ot the appellees for $6,008.62, which decree was confirmed by the Circuit Court upon argument, and from this decree appellants have taken their appeal.

VALIDITY OF PATENT.

The first attack ever made on the validity ot the patent in question is the argument now made before your honors. No such question was raised in the Court below.

If it is intended to make the objection that the description of the invention in the specification in the Letters Patent is not sufficiently clear to enable persons skilled in the art to make and use the patented design, this objection comes too late.

This is a question of evidence and the rules of pleading of fairness and common sense require that the issue should be raised either by plea or answer, that the complainants may have the opportunity of meeting it with evidence. In *Rubber Co.* vs. *Goodyear*, 9 *Wallace*, 793, where an objection of this character, not raised before, was taken upon the argument before this Court, the Court said: "The proposi-
"tion that the patent is fatally defective because it is im-
"possible to make merchantable goods according to the

" directions contained in the specification, cannot be enter-
" tained. The answer contains no averment upon the sub-
" ject. No such issue was tendered the complainants."

The objection cannot be that there is any misrepresentation or ambiguity in what is claimed. The most untutored intellect after reading the specification and claim and examining the drawing attached cannot fail to know exactly what is claimed.

If the argument be that Section 4,888 of the *Rev. Stat.* requires a *written* description of the invention, the reply is that this section must be taken in connection with the following one, Section 4,889. The first quoted section requires that the specification shall be in writing, the last that part thereof, where the nature of the case admits, shall be by drawings. There is no indication as to what proportion of the specification is to be in writing and what by drawing, but a fair construction would seem to be that there should be so much of each as would best conduce to the object aimed at in these sections, namely, to enable any one skilled in the art to use the invention.

In *Earle* vs. *Sawyer*, 4 *Mason*, 1, 9, 11, counsel in opposition to the patent, claimed that " by the very terms of the " patent act there must be a written description (without " reference to drawings) in such full, clear and exact terms " as to distinguish the things patented from all other things." Judge Story, in deciding the case, denied this, and after reciting that part of the act providing for drawings, said: " This is an explicit direction to annex drawings where the " nature of the case admits of them with *written* references; " and when so annexed they become part of the *written* " description required by the act." The same thing was decided in England (where the patent laws require of the patentee that the specification shall be " an instrument in writing under his hand and seal"), in the case of *Bloxam* vs. *Elsee*, 1 *C. & P.*, 558, Abbott, C. J., saying: "An inventor " of a machine is not tied down to make such a specification " as by words only would enable a skilful mechanic to make

"the machine, but he is to be allowed to call in aid the "drawings which he annexes to the specification; and if, by "a comparison of the words and the drawings, the one will "explain the other sufficiently to enable a skilful mechanic "to perform the work, such a specification is sufficient."

So much more is the rule applicable to designs, which are in their nature different from machines, since a design cannot be separated into its parts like a machine, for the parts are merged in the whole, which is the finished design. Judge Strong, in delivering the opinion of the Court in *Gorham Manufacturing Company* vs. *White*, 14 *Wallace*, 524, explains this very clearly; he says: "Manifestly the mode in which those appearances" (the design) "are produced has "little to do with giving increased salableness to the article. "It is the appearance itself which attracts attention and "calls out favor. It is the appearance itself, therefore, no "matter by what agency caused, that constitutes mainly, if "not entirely the contribution to the public which the law "deems worthy of recompense." How can this appearance be more lucidly described than by a pictorial representation?

Every design is in a sense made up of old parts. Every conceivable figure in the last analysis is composed of only straight and curved lines, and to deny a design merit because some of its parts are old, would be to deny the patentability of all designs. The designer takes these straight and curved lines and creates a new design. If he has genius and inventive ability the design is a good one, and he may obtain a patent therefor, if the design be new. When this patent is attacked in Court, the person so attacking has the same latitude in showing that the design is not new, as the patentee has in protecting his design. If it can be shown that prior to the invention as claimed a design existed so similar to the patented one that an ordinary purchaser would mistake one for the other, then the patent must fall. No such attempt was made in this case; on the contrary, the appellants, with extensive knowledge of designs for carpets, solemnly swear in their answer (page 5 of Record) that they

"believe that one Charles A. Righter" (the assignor of the appellees) "was and is the original and first inventor of a certain design for a carpet-pattern as set forth in the bill of complaint." Further, no one can read the testimony of Webster, the appellant's designer (page 24 of Record) without coming to the conclusion that he copied the infringing design from the patented one.

Further than this, even if the specification were defective, which it is earnestly urged it is not, it cannot be made the subject of a defence unless it is shown it was made so with a fraudulent intent. Section 4,920 of the *Rev. Stat.* provides that to make this a good defence it must be proved "that for the purpose of deceiving the public the description "and specification filed by the patentee in the patent office "was made to contain less than the whole truth relative to "his invention or discovery, or more than is necessary to "produce the desired effect." And it is not pretended any such fraudulent intent has been averred or proved. See *Loom Co.* vs. *Higgins*, 105 *U. S.*, 588.

The criticism of the word "configuration" used in the claim is certainly hypercritical. Although this word is used to describe figures of more than two dimensions, it is also used to describe the shape of figures on a plane surface. A reference to both Worcester and Webster will show that the example they give of the use of the word is as applied to the "configuration" of the planets in one's horoscope, and these horoscopes, it is well known, were drawn on plane surfaces.

INFRINGEMENT.

As to the question of infringement, the appellants eventually did not deny that they made and sold the carpeting claimed to be an infringement, but they claimed that the infringing carpet was not an infringement, because there was some difference in the figures going to make up the pattern.

Now, the case of *The Gorham Manfg. Co.* vs. *White*, 14 *Wallace*, 526, sets out the law fully as to the difference of minor details in a pattern. Mr. Justice Strong, in delivering the opinion of the Court, says: "We do not say that, "in determining whether two designs are substantially the "same, differences in the lines, the configurations, or the "modes by which the aspects they exhibit are not to be "considered; but we think the controlling consideration "is the resultant effect. Such was the opinion of Lord "Chancellor Hatherly in *McCren* vs. *Holdworth*, 6 *Ch. Ap.* "*Cases*, *Law Reports*, 418. That was a suit to restrain an "infringement of a design for ornamenting a woven fabric. "The defence was a denial that the design used by the "defendants was the same as that to which the plaintiff was "entitled. The ornament on both was in part a star, but "in one it was turned in an opposite direction from that in "the other: yet the effect of the ornament was the same to "the eye. The Lord Chancellor held that the important "inquiry was whether there was any difference in the effect "of the designs, not whether there was any difference in "the details of ornament. 'If,' said he, 'the designs are "used in exactly the same manner, and have the same effect, "or nearly the same effect, then, of course, the shifting or "turning round of a star, as in this particular case, cannot "be allowed to protect the defendants from the conse-

"quences of piracy.' This seems most reasonable, for, as "we have said, it is the effect upon the eye which adds "value to articles of trade or commerce."

And further on in the same opinion the learned Judge says: "We are now prepared to inquire what is the true "test of identity of design. Plainly, it must be sameness "of appearance, and mere difference of lines in the drawing "or sketch, a greater or smaller number of lines, or slight "variances in configuration, if insufficient to change the "effect upon the eye, will not destroy the substantial iden- "tity. * * * So a pattern for a carpet or a print may "be made up of wreaths of flowers arranged in a particular "manner. Another carpet may have similar wreaths ar- "ranged in a like manner, so that none but very acute "observers could detect a difference. Yet in the wreaths "upon the one there may be fewer flowers, and the wreaths "may be placed at wider distances from each other. Surely, "in such a case, the designs are alike. The same concep- "tion was in the mind of the designer, and to that con- "ception he gave expression. * * * We hold, there- "fore, that if in the eye of an ordinary observer, giving "such attention as a purchaser usually gives, two designs "are substantially the same; if the resemblance is such as "to deceive such an observer, in inducing him to purchase "one supposing it to be the other, the first one patented is "infringed by the other."

Now, that such was the identity of the design of appellants was conclusively shown by the evidence.

John Wilmer Martin, on page 12 of the record, says:

"*Question.*—From your experience as a seller of carpets, "do you think an ordinary purchaser would be apt to mis- "take 'Exhibit No. 3' (appellants' carpet) for 'Exhibit "No. 2' (carpet bearing the patented design)?

"*A.* I think it would be almost impossible for any one "to tell them apart, that had not seen them together."

"*Q.* Do you know of any instances where 'Exhibit No. "3' has been purchased instead of 'Exhibit No. 2,' by mis- "take?"

"*A.* Yes I know quite a number where they bought "No. 3 to take the place of No. 2."

Thomas Depuy on page 16 says:

"*Q.* From your experience as a dealer in carpets, state "whether or not an ordinary purchaser in buying a carpet "would be likely to mistake 'Exhibit No. 3' for 'Exhibit "No. 2?'"

"*A.* In my opinion it would be safe to say that not one "customer in twenty-five would know the difference."

"*Q.* Do you know of any instances in which the mis- "take has been made?"

"*A.* Mr. Golden, the book-keeper for the house of "Dornan, Maybin & Co., stopped in at my store to get a "carpet for his own use; wishing one of the pattern of "'Exhibit 2,' he walked up to the imitation or copy, and "said he wanted one of this."

Mr. Golden corroborated this on page 19 of the record.

Alexander W. Skilton, on page 17, says:

"*Q.* From your experience as a seller of carpets, please "state whether or not an ordinary purchaser in selecting a "carpet would not be likely to mistake 'Exhibit No. 3' for "'Exhibit No. 2?"

"*A.* Certainly he would. I think I have mistaken it "myself."

"State on what occasion?"

"*A.* When I first saw "Exhibit No. 3,' I took it to be the same pattern."

"*Q.* Where did you see it?"

"*A.* At Jacob Riegel's on Market street. I inquired "at that time if it was not Dornan & Maybin's goods, and I "was told it was Dobson's."

The history of the getting up of the infringing design showed it was not an original design by the party who got it up, but was a copy from the patented design.

Dixon Bean, on page 8, testifies he took a piece of the carpeting bearing the patented design for Field, Leiter & Co., to the factory of the appellants, who thereupon made the infringing design.

John T. Webster, the designer of appellants, who drew the design from which the infringing carpet was made, testified on pages 27 to 31, that he had seen the piece Bean left with appellants at the factory of appellants before he drew the infringing design.

The two pieces of carpets, one bearing the patented design and the other the infringing design, were inspected by the Court below, who decided that the similarity was such that both designs were the same.

Another proof of the identity of the two designs was the fact touched upon later in this argument, that after Field, Leiter & Co., obtained the infringing design from appellants they ceased to buy from appellees, and so with other customers of appellees after the appellant's infringing design was in the market. The one replaced the other. This is also testified to by Robert Dornan, on page 45 of the record:

"*Q.* Did you notice any falling off in the sales of your "carpets bearing the design in question after the defendants "introduced theirs upon the market."

"*A.* We did lose some trade. We lost the trade of "Field, Leiter & Co., and of others, through their being "able to supply the Messrs. Dobson's carpet in place of ours."

This is corroborated by an examination of the tables showing the sales by appellants and appellees, "Exhibit A," page 62, of the record, and "Exhibit D," page 70.

It cannot be admitted, as stated in the argument of the appellants, that the evidence on the subject of the similarity or dissimilarity of the patterns of the appellants and appellees, was of nearly equal weight. Appellants' witnesses only gave their opinions as to whether one carpet might be mistaken for the other, whereas those of the appellees testified to facts; instances where the carpets had actually been mistaken one for the other.

DAMAGES.

The main question, however, in the case, seems to be as to the computation of damages suffered by the appellees. The question is of course approached with diffidence since the decision in the cases of infringements by the same appellants, reported in 114 U. S. Reports. Still, there is a view of the case which does not appear to have been urged in those cases, and which induced the Court below to sustain the decree of the Master now appealed from. The opinion which was given by one of your Honors was unfortunately an oral one, and therefore does not appear in the record. This view counsel for the appellees now feels it to be his duty to urge upon the Court.

It is derived, first from the consideration of the difference in the nature of a patent for a design, and that of a patent for a machine, an improvement on a machine, or a process, which difference renders the theory of computing damages in one case inapplicable in the other.

And secondly from the fact that the Master did not compute as damages the whole profit on the article sold, but merely the profit on the whole after deducting the cost and profit on the parts.

Now as to the first point: In a patent for a machine or process, it is the means of producing a result that is patented and not the result itself, and the value of the patent is founded directly on its utility as to producing this result. The result is the common property of all, and the only benefit the public gets is a cheaper way (or a quicker or easier way which can be reduced to the same thing) of accomplishing this result. The Court acting upon this theory will give the owner of the patent only the difference in cost between the patented way of accomplishing the result and the unpatented way, and this indemnifies him as far as he should be indemnified.

But with a design patent it is different. There the result of the labors and genius of the inventor is itself patented. Whether there is any value in the result it has been argued is a matter of mere caprice, but this does not certainly seem to be the opinion of those practically acquainted with the subject, or in consonance with the evidence in the case. One of the appellants himself testifies to this when asked why he preferred a good to a bad design. He answered, "For the same reason that I prefer a good horse. If you get a good design and good colors, you get a good and salable carpet." (p. 81.) The same witness in his answer to the previous question had said, "Designs should be drawn so that the parting of the colors will be distinct." Showing that to give the proper effect to the colors there must be a good design. This discussion, too, of the value of a design seems more a criticism upon the wisdom of the Act of Congress authorizing patents for designs, than an argument upon the application of the law. By passing the act the Legislative power has recognized value and merit in these designs and given a property in them to the inventor, which it seems the Court should recognize and protect.

Now, in protecting this right of the inventor of a design in the matter of damages, the same rule cannot be applied as in the case of an inventor of a machine, for no result is here obtained to the accomplishing of which there are other unpatented methods open to the public, which can be compared with the patented method. You cannot say that the purpose of the design is ornamentation, and the same purpose can be obtained by other designs, for it is the very difference in the character of ornamentation that is patented. The patented design instead of being an incident to the result, as in the case of a patented machine, is itself the principal object, and the means to produce it are the incidents. The carpet is to the design what the paper is to a copyrighted book, or the canvas to a picture. The property in the design becomes of the nature of that of a copyright. The infringer can no more say to the patentee, "You are entitled to no

"damages because he to whom I sold was moved by mere "caprice, and had I had any other pattern, he would have "bought that instead" than could a piratical publisher of a copyrighted work of Longfellow, for instance, say to Mr. Longfellow, "You are entitled to no damages, because, if I "had not your work for sale, the purchaser might have "bought a copy of Bryant."

How then is the owner of a patented design to be protected? By assuring to him the strict monopoly of his patent. The intendment to be drawn from the Act of Congress is that the design is *sui generis* and the particular property of the inventor. This reasoning has been especially approved in *Gorham Co.* vs. *White*, 14 *Wallace*, 524. Justice Strong, in delivering the opinion of the Court, says: "The "Acts of Congress, which authorize the grant of patents for "designs were plainly intended to give encouragement to "the decorative arts. They contemplate not so much utility "as appearance, and that not an abstract impression or pic- "ture, but an aspect given to those objects mentioned in "the acts. * * * * * And the thing invented or pro- "duced, for which a patent is given is that which gives a "peculiar or distinctive appearance to the manufacture, or "article to which it may be applied, or to which it gives "form. The law manifestly contemplates that giving cer- "tain new and original appearances to a manufactured article "may enhance its salable value, may enlarge the demand "for it, and may be a meritorious service to the public. It, "therefore, proposes to secure for a limited time to the "ingenious producer of those appearances the advantages "flowing from them. Manifestly the mode in which those "appearances are produced has very little, if anything to do "with giving increased salableness to the article. It is "the appearance itself, which attracts attention and calls "out favor or dislike. It is the appearance itself, there- "fore, no matter by what agency caused, which constitutes "mainly, if not entirely, the contribution to the public, "which the law deems worthy of recompense. The appear-

"ance may be the result of peculiarity of configuration, or "of ornament alone, or of both conjointly, but in whatever "way produced it is the new thing or product, which the "patent law regards. To speak of the invention as a com- "bination or process, or to treat it as such is to overlook its "peculiarities. As the Acts of Congress embrace only "designs applied, or to be applied, they must refer to finished "products of invention rather than to the process of finish- "ing them or to the agencies by which they are developed. "A patent for a product is a distinct thing from a patent for "the elements entering into it, or for the ingredients of "which it is composed, or for the combination, which causes "it."

If then the inventor has a peculiar ownership in the invention as a whole, and a right to the absolute monopoly of it, it is clear that every sale of a carpet bearing the patented design may take from the patentee the profits of that sale, and that every such sale must take away from him such profits, if it can be shown that such sale directly prevented a sale by the patentee.

A confirmation of these views is found in the following authorities:

In *Seymour* vs. *McCormick*, 16 *Howard*, 489, Grier, J., says: "The mode of ascertaining actual damages must nec- "essarily depend on the peculiar nature of the monopoly "granted. A man who invents or discovers a new com- "position of matter, such as vulcanized India rubber, or a "valuable medicine, may find his profits to consist in a strict "monopoly forbidding any one to compete with him in the "market, the patentee himself being able to supply the "whole demand at his own price. If he should grant "licenses to all who might desire to manufacture his com- "position, mutual competition might destroy the value of "each license. This may also be the case where the patentee "is the inventor of an entire new machine. If any person, "could use the invention or discovery by paying what a jury "might suppose to be a fair value of a license, it is plain

" that competition would desiroy the value of the monopoly. " In such cases the profit of the infringer may be the only " criterion of the actual damage of the patentee."

And the same Judge, in *Livingston* vs. *Jones*, 2 *Fish. Pat. Cases*, p. 211, in deciding that the complainants were entitled to the whole net profits of the infringers, says: " The great question of the case now recurs: Is this Janus- " faced lock a peculiar and distinct machine introduced into " market as a cheaper and better article than other machines " without the peculiar characteristics of the patented one? " Does the value of the patent to its owners consist in the " close monopoly of the right to make and sell this species " of lock as one individual machine? Has it peculiar char- " acteristics which distinguish it from other machines of the " same genus which give it a peculiar value in the market? " If so, the complainants have a right to demand that the " defendants, who have infringed their exclusive right to " make and sell this peculiar machine or manufacture, are " justly liable to refund all the net profits made by said in- " fringement."

Also *Rubber Co.* vs. *Goodyear*, 9 *Wallace*, 804, the Court say, as to the action of a Master appointed to compute profits and assess damages: " He refused to allow " (to the infringer) manufacturers' profits and interest in the " capital stock. This was correct. The profits made in " violation of the rights of complainants in this class of " cases, within the meaning of the law, are to be computed " and ascertained by finding the difference between cost and " yield. In estimating the cost, the elements of price of " materials, interest, expenses of manufacture and sale, and " other necessary expenditures, if there be any, and bad " debts are to be taken into account and usually nothing " else. The calculation is to be made as the manufacturer " calculates the profits of his business."

This difference in the nature of the thing patented explains the distinction between the cases above cited on the question of damages and those cited by the counsel for the

appellants and by this Court in the opinion in the cases of the appellants in 114 *U. S. Reports*, and makes the whole system consistent. It also explains the exception laid down in *Manufacturing Co.* vs. *Cowing*, 105 *U. S.*, 253, and the rule in *Garrettson* vs. *Clark*, 111 *U. S. Rep., p.* 121, that the patentee must show "by reliable and satisfactory evidence that the profits or damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine as a marketable article is properly and legally attributable to the patented feature."

To recapitulate: Where the patent is for a machine effecting a result that can be produced by other known means, or is for a part of a machine, or for an improvement on a machine, the cases cited by the appellants and in the opinion of the Court in *Dobson* vs. *Hartford Carpet Co.*, 114 *U. S. Reports*, apply.

Where the patent is for an entire machine which accomplishes a purpose no other known machine can, or for a composition of matter with properties entirely new, or for a design, which from its very nature is *sui generis*, the decision in *Rubber Co.* vs. *Goodyear*, 9 *Wallace*, and the cases following that decision apply.

Now as to the second point, that the Master in computing damages did not give the whole profit, but deducted first the cost of the various parts and processes including legitimate profits on those parts.

John Dobson, one of the appellants, in computing the cost of the carpet, takes the following charges into consideration (p. 42 of Record,) in which he is followed by Robert Dornan, one of the appellees (pp. 43 and 44), and the Master (p. 38):

1. Market price of worsted.
2. Amount of shrinkage of same.
3. Cost of dyeing worsted.
4. Market price of double reel or filling yarn.
5. Shrinkage of same.

6. Cost of dyeing the double reel.

7. Amount of waste.

8. Cost of manufacture (itemized in "Exhibit C," p. 70).

9. Discount for cash, interest on capital, bad debts, depreciation of machinery.

It will be seen that the Master in making the above charges has been even more liberal to the infringers than the Master in *Rubber Co.* vs. *Goodyear*, *ubi supra*, for these charges include, in addition to those laid down in that case, interest on capital, and depreciation of machinery.

If, as has been suggested in the argument, the carpet had been made on a patented loom, the profit due to the use of the patented loom, and belonging to the owner of that patent, would have been added to the cost of manufacture (item 8 above). Or if a patent dye had been used, the profit to the owner of that patent would have been added to the cost of dyeing (item 3 and 6 above).

Of course the only profit the owner of the patented design claims is the difference between the price at which he sells the carpet and the cost as given above.

It has been said above that if it can be shown that the sale of the infringing carpet by the infringer directly prevented the sale of so much carpeting bearing the patented design by the owner of the patent, that then the latter is injured by such sale to the extent of the profit he would have made had he made the sale. Now, whether the sale of the infringer prevented the sale by the owner of the patent is a question of fact to be determined upon examination of the evidence in the case. Robert Dornan, (page 45 of the Record), says, he lost trade through the infringements, and instances that of Field, Leiter & Co., and on page 62 of the Record is found "Exhibit A," being a list produced by the appellants of all the carpeting made and sold by the appellants bearing the infringing design and the dates of sale, and on page 70 is found "Exhibit D," being a list of all the carpeting bearing the patented design made and sold by the

appellees and the dates of sale. It will be seen by a comparison of these exhibits that appellees sold Field, Leiter & Co. a considerable amount of carpet bearing the patented design before the appellants commenced to infringe, but after that Field, Leiter & Co. bought of the appellants only, and this to an extent of 15,682½ yards. The following firms also will be found to have bought of the appellees the carpet bearing the design before the infringement and of the appellants afterwards: Lord & Taylor, New York City; Jordan, Marsh & Co., Boston; I. Kennard & Sons, St. Louis; Adams, Marson & Co., Indianapolis; Adams & Meldron, Buffalo; Harris, Chipman & Co. Boston; John L. Bert, Quincy, Ill.; S. Freedman & Co., Detroit; Almy & Bigelow, Salem, Mass.; Horliche & Dunker, St. Louis; Harbour & Dittman, Wheeling; Fitzwilliams & Sons, Bloomington, Ill.; Hilt, White & Mitchell, Urbana, Ohio.

Now, it is not a question of legal presumption, but a fair inference for a jury from the above facts, that the appellants by their infringements displaced to the extent of the goods sold by them the goods of the appellees.

The parties sold to by the appellants were the customers of the appellees, and wishing the patented design, and knowing appellees had it for sale, they would naturally have applied to them, had not appellants offered the same thing at a lower price. And so the Master found.

LUDOVIC C. CLEEMANN,
Counsel for Appellees.

IN THE

Circuit Court of the United States

FOR THE

Eastern District of Pennsylvania.

No. 2 of April Sessions, 1874.

IN EQUITY.

DORNAN ET AL

VS.

DOBSON ET AL.

MASTER'S REPORT.

IN THE

Circuit Court of the United States

FOR THE

Eastern District of Pennsylvania.

Of April Sessions, 1874, No. 2.

IN EQUITY.

DORNAN ET AL

vs.

DOBSON ET AL.

To the Honorable the Judges of the said Court:

The Master duly appointed under the following decree respectfully reports.

DECREE.

April 25th, 1876.—This case came on to be heard on the pleadings and proofs, and was argued by counsel for the respective parties, and thereupon, upon consideration thereof, It is ordered, adjudged and decreed that Letters Patent for a design for a carpet pattern No. 6822, dated August 19th, 1873, granted to Messrs. Dornan, Maybin & Co., Assignees of Charles A. Righter, is a good and valid patent, being the patent referred to in complainants' bill, and that the said Charles A. Righter was the first and original inventor of the

design described and claimed in the Letters Patent, and also that the said defendants John Dobson and James Dobson have infringed upon the said patent, and the exclusive rights of the complainants under the same. And it is further ordered, adjudged and decreed that the complainants do recover of the defendants John and James Dobson, the profits, gains, savings and advantages which the said defendants have received or made, or which have arisen or accrued to them from the said infringements of the said patented design, and also such damages in addition to said profits as the complainants may have sustained by reason of the said infringement; and it is further ordered, adjudged and decreed that the complainants do recover of the defendants their costs and charges and disbursements in this suit to be taxed. And it is further ordered, adjudged and decreed that it be referred to John Cadwalader, Jr., Esquire, as Master, to ascertain and take and state and report to the Court an account of the gains, profits, and advantages which the said defendants have received, or which have arisen or accrued to them from infringing upon the exclusive rights of the said complainants by the manufacture, use and sale of carpeting bearing said patented design, and also, what damages in addition thereto have been suffered by the complainants by reason of said infringements. And it is further ordered, adjudged and decreed that the complainants on such accounting have the right to cause an examination of the said defendants *oretenus* or otherwise, and also the production of the books, vouchers and documents of the defendants, and that said defendants attend for such purposes before said Master from time to time as said Master shall direct. And it is ordered, adjudged and decreed that a perpetual injunction be issued in this suit against the said defendants John Dobson and James Dobson, according to the prayer of the bill.

The Master was attended at his office, in the City of

Philadelphia, by L. C. Cleeman, Esquire, for complainants, and Richard P. White, Esquire, for the defendants.

Testimony was taken both on behalf of the complainants and defendants, all of which has been printed, and will be returned to the Court if it be so ordered.

The Master finds that the complainants early in the year 1874 notified the defendants of their infringing their design, and after a second notification the defendants wrote the following letter:

Philadelphia, May 25th, 1874.

MESSRS. DORNAN, MAYBIN & Co.,

Gentlemen:

We have your favor of this date, and note contents. We are not aware of infringing on any of your patterns. We, upon the previous notification, investigated this case throughout and found that we were not interfering with you or your pattern, and can only reiterate upon what was stated to you previously, that we are not making any carpet for which you hold letters patent, notwithstanding the proof you say you have, at 615 Chestnut street.

Truly, yours,

JOHN & JAMES DOBSON.

The defendants made and sold between 11th of February, 1874, and April 15th, 1876, together with one sale made after issuing the injunction in September, 1876, Fifty-two thousand and forty-three and one-half yards (52,043½ yards). Of this total amount a very large proportion was sold to customers who had previously bought the genuine carpet of the complainants. Of these customers the principal ones were Field, Leiter & Co. of Chicago, who purchased of the defendants within the dates mentioned 15,682½ yards of the imitation pattern. This Chicago firm had, within a few

months preceding the manufacture by the Dobsons, purchased over 2000 yards of the genuine carpet from the complainants. It was shown by the evidence taken by the Examiner, that the purchasing agent of the Chicago house, Dixon Bean, had taken a piece of the genuine carpet to the Dobsons and asked them to make something like it, and soon afterwards they issued the carpet decided to be an infringement.

Mr. James Dobson testified at considerable length, to the fact that his firm had sold all of their ingrain carpets at prices which yielded them no profit whatever.

He analysed the cost of manufacture, and according to the figures given by him, his general statement that no profit accrued was satisfactorily verified by the details. Indeed so far from any profit it appeared from Mr. Dobson's testimony that they conducted their business at a heavy loss.

He states "the bulk of these goods was made in 1874, and we sunk in that year in manufacturing these goods, (ingrain carpets) which we made almost exclusively, seventy thousand dollars in addition to the interest on our capital invested."

In the years 1874 and 1875 the Dobsons manufactured altogether 1,119,732 yards of ingrain carpets, so that about $\frac{1}{21}$ of the whole of their manufacture was of the infringing design. The remarkable popularity of this design is thus shown, as Mr. Dobson testified that they had made over 120 different designs in these years.

It was testified that designs for carpet were not of themselves of much value, rarely bringing in the designer's hands over $10. There was no testimony offered to show what the value was of a design that had been put in use and proved popular in the manufacture. From the figures already given, however, the extraordinary difference in their salability is

apparent. It was conceded that usually difference of design did not vary the price. That is, carpets made of similar quality, and alike in materials and colors, brought the same prices, irrespective of design. The complainants had been for many years in the business; but the Dobsons had only begun to manufacture carpets in 1872.

The complainants asked to have awarded to them as damages and compensation for the injury inflicted upon them whatever profit the defendants may have made—and also whatever loss they the complainants had incurred which could be measured by the profits that would have accrued to them if they had made the exclusive sales of the carpet, deducting in such case the amount of profits, if any, made by the defendants.

The defendants however contended that all that the complainants were entitled to, was not what they the defendants had made or saved on the carpets; but only what they made or saved by reason of the use of the pattern as compared with what they could have made without it, and therefore unless they could sell the carpet bearing the design at a higher price than other carpets, whereby they made more or lost less, no profit resulted to them.

They further contended that unless it was shown by direct evidence that the complainants would have made the sales which the defendants did had they not infringed, the fact could not be inferred. In support of these views the case of Seymour *vs.* McCormick, 16 Howard, 488, was cited. In that case the Supreme Court held that in a suit for a violation of a patent for an improvement in a reaping machine, the improvement consisting principally in giving a convenient seat for the raker, that it was error to hold the defendant responsible in damages to the same extent as if he had pirated the whole machine; and further, that it was error to lay down as

a rule for the measure of damages the amount of profits which the patentee would have made if he had constructed and sold each one of the machines which the defendants constructed and sold.

The Master does not think this case in point, when as here the inventor's profit consists in the exclusive use of the invention and in the monopoly of manufacturing for others to use. Judge Grier who delivered the opinion of the Court in Seymour *vs.* McCormick explains this distinction in Livingston *vs.* Jones, 2 Fisher, page 209. He says in this latter case, "The only cases in which the measure of the patentee's "damages is the amount of the infringer's profit, are, when "the invention is of some new machine, or a new form of "any kind of known machine, which, as a distinct species "of machine or manufacture, is more valuable or can be put "into market cheaper, so as to supercede or exclude other "machines or manufactures of the same genus; and where "the profit of the patentee consists in a complete monopoly "of the right to make and vend the new machine or manu-"facture as a unit and in the exclusion of all other com-"petition."

In the case of the Gorham Company *vs.* White, 14 Wallace, 511, it is held that a patent for a design is for the product and not merely for the means of producing the result.

In that case, which was a design for silver table-ware, the great value of a successful design is shown. It was there testified, although the design was of the simplest character, that it was worth $50,000. This value was entirely the result of its additional salability, and had nothing to do with the intrinsic value of the article produced. The fact appeared in that case also that a very few designs, out of many issued, proved successful. From the testimony of Mr. Dob-

son it appeared that more than one-half of all the ingrain carpets made by his firm, out of over 120 designs, was made upon 12 or 13 designs. It was therefore of the greatest importance to the defendants, if they hoped to contend successfully with the old established carpet manufacturers at the outset of their enterprise to secure popular designs. From the published reports of other suits instituted and recoveries against them for similar infringements of patented designs the defendants appear to have been very negligent, and to have disregarded the rights of patentees to an unusual degree. Proof of profits, or evidence of direct loss is difficult to obtain. The fact here apparent was, that the defendants were willing to lose all present gain in order to secure custom and thereby future profits. It was testified that the complainants sold their carpet at from 10 to 15 cents a yard more than the Dobsons, and that upon the prices obtained by them their profit was in the year 1874, 13¾ per cent. and in 1875, 10¾ per cent.

An equal profit might have been made by the Dobsons had they asked the same prices. By underselling they increased the injury to the complainants, and it would be manifestly unjust that a benefit should accrue to them from this additional wrong to the patentees.

In the Cawood Patent, 4 Otto, page 710, Strong J. says: "In settling an account between a patentee and an infringer "of the patent the question is not what profits the latter has "made in his business or from his manner of conducting it, "but what advantage has he derived from his use of the "patented invention." And in McComb *vs.* Brodie, 5 Fisher, Pat. Cas., 394, Wood J. says: "The rule is not what de- "fendant made by the infringement, or what he might have "made, but it is the loss sustained by the plaintiffs by reason "of the infringement. It is proper to inquire how many "customers were diverted from plaintiffs by the wrongful

" conduct of defendant and what loss plaintiffs have sustained " in profits by reason of such diversions."

Applying these authorities to the facts of this case, it seems that the Dobsons obtained very great advantages from the patented invention; but instead of securing a money profit, they preferred to secure the trade. They therefore sold for less than cost when the similar carpet, at the same time and place, was bringing in other hands a fair profit. Had they made such a profit it would properly belong to the complainants; and if they preferred to reap their profits indirectly, the benefit, gain, or advantage may be reasonably estimated as equivalent to the money profit they might have made.

The evidence clearly indicated that customers were diverted from the complainants. Field, Leiter & Co. had been large purchasers of this very carpet from the complainants; but after the Dobsons copied it, at the request of their purchasing agent, Dixon Bean, they became customers of the defendants, and bought more than one-fourth of all of this carpet which the Dobsons made. A witness, John W. Martin, testified before the Examiner that a purchaser of the Dobson carpet had told him that he bought it because he could not get the complainant's carpet fast enough.

From the lists of purchasers, in evidence, it appeared that many of the persons dealt with both firms, and it is only reasonable to suppose that the purchasing agents would visit both factories before deciding, and that they would select the cheaper article.

Mr. Dornan testified to the fact: he said "We lost the " trade of Field, Leiter & Co. and of others, through their " being able to supply the Messrs. Dobsons carpet in place " of ours."

This Court in the recent decisions in the cases of The

Bigelow and the Hartford Carpet Companies against the present defendants has adopted a very reasonable basis, in analogous cases, and which is applicable here, upon which the damage may be computed:

McKennan, Cir. J. in these cases says "All that is left for "presumption is that the infringing carpets displaced in the "market the complainant's carpet, and hence that the profits "which would have accrued to them upon the quantity of "carpets put upon the market, is the measure of their damages. "This presumption as against a wrong-doer is not unrea-"sonable."

In those cases it was shown that the infringers had made a profit in the carpet sold by them, and in that respect they differ from the present case. But the Master is of the opinion that a reasonable profit could have been made by the defendants, and that as the profits of the complainants were computed on a very fair basis, they can be accepted as the basis of what the defendants might have made. The presumption that the defendants' carpets displaced the complainants' carpets in the market is perhaps stronger than in the cases just cited, because the manufacturers were in the same city. Every presumption should be taken most strongly against the defendants. They wilfully and deliberately incurred the risk. They disregarded repeated warnings, and refused to accept the proofs that were offered them.

Ordinary prudence should have prevented their continuing the manufacture pending the decision of the question of the infringement. The demand for this particular carpet was so great, that it is reasonable to suppose that the trade would have been compelled to obtain the genuine design if the pirated article had not existed, and the Master is of opinion that they lost all of this trade in consequence of such piracy. How far the complainants suffered through the defendants'

action in the loss of customers for their other carpets, considerable though it may have been, is too speculative to be estimated.

The Master therefore awards to the complainants an amount as shown in the following statement, equal to the profits they could have made in the years 1874 and 1875, respectively, in the carpet made and sold by the defendants, if they the complainants had made and sold it themselves.

By the complainants' testimony, it was shown that their average profits for the year 1874 on these carpets was thirteen and three-quarters (13¾) per cent. and for 1875 ten and three-quarters (10¾) per cent., and that the average price per yard was more than one dollar.

By the testimony of Mr. Dobson and schedules offered in evidence, it appears that the defendants made and sold 19,243½ yards in 1874, which would have yielded at one dollar a yard $19,243.50, and the profits of the complainants at 13¾ per cent. would have been $2,645.97. From the same testimony it appears that the defendants in 1875 made and sold 31,280½ yards, which at one dollar would have yielded $31,280.50, and at the rate of profit for that year, 10¾ per cent., the complainants would have made $3,362.65. There was no testimony as to the rate of profit in 1876; but as the amount of sales was unimportant in that year, the Master has not included it in his award.

The Master therefore finds and reports that the complainants, by reason of the infringement by the defendants of their patented design for a carpet pattern No. 6822, dated 19th August, 1873, sustained damages to the amount of six thousand and eight dollars and sixty-two cents ($6,008.62).

Respectfully submitted.

JOHN CADWALADER.

118-10

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Supreme Court of the United States.

No. 202. October Term, 1885.

JOHN DOBSON, *et al.*, *Appellants*,

vs.

JOHN DORNAN, *et al.*

Brief for Appellants, in Reply.

HECTOR T. FENTON,
RICHARD P. WHITE,
Counsel for Appellants.

PHILADELPHIA:
DUNLAP & CLARKE, PRINTERS, Hastings' Building, 819 & 821 Filbert St.
1886.

Supreme Court of the United States.

DOBSON, *et al.*, Appellants,

vs.

DORNAN, *et al.*

No. 202.

Oct. Term, 1885.

ARGUMENT FOR APPELLANTS, IN REPLY.

The first assignment of error, and the statement at the beginning of the argument on page 10 of appellants' brief, of the abstract proposition that "sufficiency of a specification, when presented as a question arising in a suit under the patent laws, is always open as a defence," has called forth an argument in the appellees' brief that seems to merit reply. The objections urged are: 1. That the patent is void on its face as lacking in the requirements of Section 4,888 of the Revised Statutes; and, 2. That the specification, both in the description and the claim, is vague, ambiguous and indefinite, to such an extent as to render the patent void. This is stated here, again, clearly, in order that the learned counsel for the appellees may have fair notice of the defence actually made and have an opportunity to meet it, as in his brief (page 3) he has fallen into the error of supposing that the objection made was in part that the "description of the invention in the specification of the Letters Patent is not sufficiently clear to

enabled persons skilled in the art to make and use the patented design;" hence his citation of the decision in Rubber Co. *vs.* Goodyear, 9 Wallace 793, is not applicable; nor is his reference to Sec. 4,920, Rev. Stat., and argument based thereon, on page 6 of brief, at all in point. Neither of these special defences are urged here. In elucidation of the appellants' proposition that the defence here made is open without being specially pleaded and without notice, reference may be made to a definition of several defences based on the specification, in Curtis on Patents, Sec. 363, 4th edition, showing the distinction between the defence that the description and claim (or either) of the specification are ambiguous, and the defence that the descriptionis not sufficient to enable any one skilled in the art to make the thing patented, and again the further defence that the patentee *with intent to deceive* stated in his specification less than the whole truth or more than was necessary to produce the desired effect. These three defences are distinct and dissimilar. They are all of them elaborately stated and distinguished by Mr. Justice Story in Lowell *vs.* Lewis, 1 Mason 182. The last stated is a statutory defence, requiring to be specially pleaded, or notice under the general issue if the suit be at law, and the issues raised under these two last stated defences, are issues of *fact*, under which the defendant must produce evidence, and they are exclusively questions for the jury, at law; whereas, the first defence, that the patent is void because the description AND claim, or either, of the specification, are ambiguous, is a question of law, is not a statutory defence, and is exclusively for the Court to determine, precisely as is the defence of want of patentability (by reason of the thing patented not involving invention) appearing on the face of the patent, which also is not a statutory defence, but

is always open in a suit on a patent and without being specially pleaded and without notice (Slawson *vs.* Grand St. R. R. Co., 107 U. S. 649.)

The difference between two of these defences is clearly illustrated in the case of Dixon *vs.* Moyer, 4 Wash., 68, in which Mr. Justice Washington says: "It was insisted * * * that this specification is perfectly intelligible to an artist * * *; and, if it be not so, still that the defendant cannot take advantage of the defect unless he has stated in his notice, and proved at the trial, an intention in the patentee to deceive the public. But these observations are all wide of the objection, which is not that the specification does not contain the whole truth relative to the discovery * * It is admitted that the specification does not offend in these particulars, but the objection is that throughout the whole of a very intelligible description * * the patentee has not distinguished what was new from what was old or before in use, nor pointed out in what particulars his improvement consisted."

In Curtis on Patents, it is thus stated: Sections 222 and 229, whether the invention itself be specifically described with reasonable certainty is a question of law for the Court; and in Section 223, that it is however, the province of the jury to decide whether the invention is described in such full, clear, and exact terms as to enable anyone skilled in the art to put it in practice, citing under both sections, Davis *vs.* Palmer, 2 Brock. 298, and Lowell *vs.* Lewis, 1 Mason, 182. In the latter case it was said that a general statement that the patented machine was, in all material respects (without stating what respects) an improvement on an old machine, is no specification at all.

Having thus shown that the objection made to the patent in the case at bar, is not, as the appellees seem to suppose, an

objection under Sect. 4920, Rev. Stat., or an objection of the character referred to in Rubber Co. *vs.* Goodyear, 9 Wall., but is purely an objection arising on the face of the instrument, exclusively for the Court to determine as a question of law, and not a question of fact to be decided on the evidence; it remains only to ascertain whether such objection need to be specially pleaded or notice thereof given.

In stating what are the statutory defences, and what other defences are permitted, Mr. Curtis, in Sect. 363 and 368, unqualifiedly states that such defence can be taken advantage of under the general issue without notice.

The statute does not undertake to enumerate all the defences which may be made to an action on a patent.

Bump on Patents, page 330, 2d ed., note to sec. 4920, after referring to the statutory defences, and to the remarks in Gayler *vs.* Wilder, 1 Blatch. 597, that "most of the matters required by this section to be set forth in a notice, could be given in evidence under the general issue, without notice, were it not for the section; or, to speak more accurately, are involved in the general issue; they are affirmative facts which the plaintiff would be bound to maintain as essential to the validity of his patent." ——— states, in relation to the other defences not enumerated in the statute, "there are defences of which a party may avail himself under the general issue, without giving notice to the patentee, because no such notice is required by the Statute, as, for instance, that there is no specification, or that the specification is altogether ambiguous and unintelligible, or that the patent is broader than the discovery, or that it is for an improvement which the specification does not so particularly describe as to distinguish it from the original invention, and perhaps others similar in principle;" citing Kneass *vs.* Schuyl-

kill Bank, 4 Wash. C. C. 9, and Grant *vs.* Raymond, 6 Pet. 218. To the same effect is Sec. 363 of Curtis on Patents; and p. 308 Philips on Patents.

And the same conclusion is to be drawn from the opening paragraph of the opinion by Mr. Justice Clifford in Roemer *vs.* Simon, 97 U. S. 215, that the patent is *prima facie* evidence of title, etc., and its offer in evidence followed by proof of infringement, casts the burden on the defendant, "*unless the patent is materially defective in form*;" going to show that if the patent is void on its face for insufficiency in the description or claim, or otherwise not in conformity with the statutory requirements as conditions precedent to its lawful issue, the objection can be taken irrespective of the defences pleaded and as on a demurrer to evidence or motion for a non-suit. Evans *vs.* Chambers, 2 Wash., 125.

Whether the specification and claim disclose what the invention is and what is claimed, is *for the Court*; but whether the specification is sufficient to enable any one to make the invention is *for the jury*. See this distinction elucidated in Curtis on Patents, Sec. 235, referring to Davis *vs.* Palmer, 2 Brock. 298, wherein Marshall, C. J., in the opinion, says, "it may not, perhaps, be easy to draw a precise line of distinction between a specification so uncertain as to claim no particular improvement, and a specification so uncertain as not to enable a skilfull workman to understand the improvement and construct it. Yet we think the distinction exists."

These two defences, separate, distinct and totally different, one a question of law arising on the face of the patent, and the other a question of fact on the evidence, are both discussed under the head of "ambiguity" in the specification, and defences arising in consequence thereof, in Curtis on Patents, Sections

222, 235 and 363 to 368 and notes thereunder, to which reference is made and attention requested.

And so, as this defence is based on an alleged insufficiency of the instrument creating the grant, it is a question of construction of the patent, is a question of law, and is to be determined from an inspection of the specification, saving only where there are technical terms in the description requiring the the testimony of those having technical knowledge to elucidate or explain. Washburn *vs.* Gould, 3 Story's Rep., 122.

It is very similar in that respect to the defence that the patent on its face does not disclose any patentability. This defence, like the last, may or may not require testimony in support of it. It may be apparent from the history of the art, as disclosed in the specification, that the improvement claimed does not arise to the dignity of an invention, but involved mechanical skill only in its production; or the evidence of the state of the art, established by proof *de hors* the patent, may require such a narrow construction of it as to strip the improvement of all its patentable features, and reduce it to a mere mechanical adaptation of the old device; or the Court may even take judicial notice, without evidence, of the state of the art in so far as it includes the use of things within the domain of common knowledge, and so reduce the thing claimed from a change involving invention to one requiring mere mechanical skill to construct.

The defence of want of patentability appearing on the face of the instrument, it is now well settled is always open, can even be taken advantage of for the first time in this Court on appeal, and may even be interposed by the Court *sua sponte* if not made by counsel; it requires no special plea, nor any

notice under the general issue, and is not one of the statutory defences mentioned in Sec. 4920, Rev. Stat. It is a defence arising on the face of the instrument. Slawson *vs.* Grand Railway Co., *ubi supra.* The opposite of this conclusion was there contended for, but was overruled, following Brown *vs.* Piper, 91 U. S., 37; Dunbar *vs.* Myers, 94 U. S., 187, and other cases.

The same reasoning applies with equal force to *any other defect appearing on the face of the patent.*

The citation of Loom Co. *vs.* Higgins, 105 U. S., 588, does not support the appellee's contention. This Court did not there decide that the "plea of insufficient description" could not be made without an allegation of fraudulent intent, under Sec. 4920, Rev. Stat., but left it an open question; nor that the special defence provided in this section was the only one that could be interposed to defeat a patent on the ground of a defective or insufficient specification, whether the objection be either to the descriptive portion thereof or to the claim. The real question presented and discussed in Loom Co. *vs.* Higgins was therefore not the same as that in the case at the bar, but a wholly different one.

Such being the law, it is pertinent to inquire whether the patent in suit is fatally defective on its face; *i. e.*, whether it contains any description and claim, or any sufficient specification of the alleged invention mentioned in its title.

Sec. 4,888, Rev. Stat., prescribes what are the essential pre-requisites for the grant of a valid patent, among others, that "before any inventor * * shall receive a patent * * he shall file in the Patent Office a *written* description of the same, etc., * * * *and* he shall particularly point out and distinctly claim the part, improvement, or combination which he

claims as his invention or discovery." And Sec. 4,889 requires a drawing to be filed, to be annexed to the specification, and to form a part thereof.

It will be noticed that the specification is made up of two parts, viz.: the description and the claim. It is quite true, as stated in Hogg *vs.* Emerson, 2 Blatch. 1; s. c. 6 Howard, 437, that the drawing may be referred to to help out the description; and, as said in Washburn *vs.* Gould, 3 Story, 122, the drawings may be referred to to show the nature and character and extent of the claim, as well as to compose a part of the description.

But it is nowhere held or even intimated that the drawing, of itself, and unaided by any descriptive words, is sufficient to supply the place of and to form the *whole* of both the description *and* the claim, making up the entire specification.

This Court has frequently defined the objects and purposes of a specification to be, to enable the public to understand and make use of the invention and have the benefit of it after the expiration of the patent; and also, to define the extent of the monopoly. The first is accomplished by the drawing and descriptive part of the specification, and the latter by the summary or claim. Mr. Curtis says, Sec. 230 of his work on Patents, "The statute requires the patentee to give 'a written description of his invention on discovery' (the quotation marks are the author's). This involves the necessity, in all cases where the invention makes use of what is old, of distinguishing between what is old and what is new. He is required to point out in what his invention or discovery consists."

This Court, in Seymour *vs.* Osborne, 11 Wallace, 516, 540, defining the statute, says, "Inventors of machines are required, before they receive a patent, to deliver a written description of

their inventions, and of the manner and process of making, constructing, and using the same, in such full, clear, and exact terms as to enable any person skilled in the art or science, to make, construct, and use the same, and fully to explain the principle by which the invention may be distinguished from others of like kind; and they are also required to specify and point out the part, improvement, or combination which they claim as their invention. Doubtless, *these several requirements may be regarded as conditions precedent to the right of the Commissioner to grant the application, as they must appear on the face of the letters patent, and are always open to legal construction as to their sufficiency.*"

In the same case the defence was made in the following words, page 541, "that the letters patent are void and of no effect because the patentees did not specify and point out in their specifications and claims, the parts, improvements, or combinations, which they claim as their respective inventions;" which is answered in the opinion of the Court, in the following language—"*Grant the theory of fact assumed in the proposition, and the conclusion would follow.*

Indeed so essential is it that the patent, to be sustained, must contain a well defined claim, that the cases are legion, that the patentee is bound by his claim, and what he does not *specifically* claim is impliedly disclaimed, and by this is meant "claimed," in that part of the specification technically known as the claiming clause at the end thereof; and however broad and comprehensive the *description* may be, the *claim* defines the extent of the monopoly. Keystone Bridge Co. *vs.* Phœnix Iron Co., 95 U. S., 278. Railroad Co. *vs.* Mellon, 104 U. S., 118. And where there is an entire absence of claim, or such an ambiguous one that it is practically meaningless, even

though the *description* disclose an invention the novelty of which is not successfully attacked, the Court is powerless to decree such a patent valid for such invention, which was *ab initio* invalid, as lacking in the requirements of the statute under which it was created, as in Merrill *vs.* Yeomans, 94 U. S., 573.

The point made in the case at the bar, is that there is not only an entire absence of *claim* to the part, improvement or combination which is of the patentees' invention, (however much a "claim" in such general terms as here used might be viewed as sufficient *if it followed a description of the invention or improvement, pointing out the nature of the invention and wherein its novelty resided, as required by law*); but there are no *descriptive* words in the specification, and there is nothing on the face of the patent to show whether the whole is claimed as novel in all its parts, or claimed as an improved design, or what are its essential features distinguishing from previous known designs for carpets; no description in fact whatever; hence the general claim used, (which by great liberality of construction might under other circumstances, such as those stated, for instance be sustained), is here ambiguous and meaningless, and has nothing to support it.

No *descriptive* aid can be drawn from the *claim*, for as Mr. Curtis says, sec 227, "the claim is not intended to aid the description, but to ascertain the extent of what is claimed as new". And, as stated by Lord Cottenham, in Kay *vs* Marshall, 2 Webst Pat. Cas., it (the claim) is not to be looked to as a means of making a machine according to the patentees improvements.

Again, as respects the *description* in this case, there is in fact none at all, unless we are to consider that the drawings

describe to the mind of the public the thing patented; certainly there is no *written* description; and that word in Sec. 4,888 must be regarded as used in its ordinarily accepted sense, as section 4,889 uses the word "drawings" in a like sense; but while it may be conceded that the description can be *aided* by the drawing, it may be very seriously doubted if such description can be *entirely supplied* by a drawing (more especially where the whole thing shown is not of the patentees invention); and even if the alleged invention is of such nature that it can be so represented as to be intelligible to one skilled in the art, whether the positive requirements of Sec. 4888 of the Statute, requiring a *written* description, can be entirely abrogated, more especially as the succeding section, 4889 requires a *drawing* as well, *in addition* to such *written* description.

Of the two cases cited in the appellee's brief on this point, Bloxam *vs.* Elsee does not sustain the appellee's proposition that a drawing *per se* is sufficient; and Earl *vs.* Sawyer was on a patent issued under a different statute from that involved in the case at bar, prescribing different requirements in this respect; and therefore the ruling on that point has no application here.

In Lowell *vs.* Lewis, 1 Mason, 182, it was held that a specification that the patented machine was, in all material respects (without stating in what respects) an improvement on an old machine is no specification at all.

As shown by the evidence in the case at bar, the design delineated in the drawing, is but a mere improvement. Of course, novel as a unit, as any other new combination of old elements may be in that sense novel, but old in its general plan and leading features. Hence the wisdom of the law in requiring the patentee not only to *describe* the design, but to

definitely state its leading or distinguished features, which the patentee claims as of his invention, in order to distinguish it from what preceeded it in the same art, to define the extent of the monopoly, and to enable the court and the public to ascertain from it, what would or would not constitute an infringement thereof.

In Barrett *vs* Hall, 1 Mason 447, the requirements of the statute are thus stated in substance:—If the patent be for an improved machine, it must state in what the improvement specifically consists, and it must be limited to such improvement. If, therefore, the terms be so obscure or doubtful that the Court cannot say which is the particular improvement which the patentee claims, and to what it is limited, the patent is void for ambiguity; and if it covers more than the improvement, it is void, because it is broader than the invention.

Such is the defect in the patent involved in the case at bar; its specification is vague, ambiguous, and indefinite; and in point of fact it contains neither a written description nor a specific claim, and is therefore lacking in the requirements of the statute to make it a valid grant, and for these reasons is void on its face.

Notwithstanding the remarks of the learned Counsel for appellees, page 6 of brief, that the appellant's "criticism of the word 'configuration,' used in the claim, is hypercritical," attention is again called thereto, not only because it is a blundering misuse by the draughtsman of the specification of a word that renders the claim meaningless and inconsistent with the title of the invention as stated in the patent, and with the matter shown in the drawing, but because it creates an ambi-

guity in view of the fact that the statute authorizing patents for designs recognizes a well-defined distinction between invention in novel *configurations* and inventions in novel *ornamentation;* and how can a carpet design be claimed to be a novel *configuration?*

There is still another criticism, not hereinbefore alluded to, which may be made on this extraordinary specification, and which, if well founded, is a complete answer to the appellee's case. The claim is for the design "*wheu applied to carpeting.*" These words are clearly qualifying in effect, and limit the claim to the design shown only when so applied; they are an implied disclaimer to it when applied to any other use; they are substantially a declaration, amounting to a disclaimer, that it is not novel in any other application; they narrow the claim to such an extent that the use of this design on wall paper, oil cloth, or china ware, would not be within the scope of the claim, or constitute an infringement thereof; they are substantially a declaration of the state of the art to the extent mentioned; and being so, the claim on its face discloses a want of patentability in the thing patented, for it needs no citation of authorities to sustain the proposition than a mere application of an old thing to a new but analogous use does not constitute invention within the meaning of the statute, whether such novel application be of a design or a piece of mechanism.

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